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TREASURY DEPARTMENT  
FEDERAL FARM LOAN BUREAU

Bulletin No. 1

# LAND TITLE REGISTRATION BY CERTIFICATE



THE TORRENS SYSTEM SIMPLIFIED AND ADAPTED  
TO CONSTITUTIONAL REQUIREMENTS, ALONG  
LINES APPROVED BY UNITED STATES  
SUPREME COURT DECISIONS

ISSUED BY THE  
FEDERAL FARM LOAN BUREAU

April 18, 1918

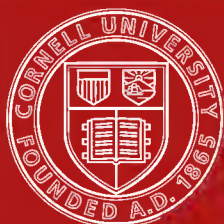
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# LAND TITLE REGISTRATION BY CERTIFICATE.

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## BRIEF.

It is stated in the accompanying comparative study that—

a judicial proceeding which ends in a decree quieting the title against all persons is the initial step in all land title registration provided by statutes in the United States. The plan is that the decree shall serve as a new starting point in determining the title; that it shall declare absolutely the only rights which exist in the land and be conclusive against "the whole world."

The scheme further contemplates that, the title having thus been conclusively adjudicated, the substance of the decree shall be entered in a "register of titles," containing a description of the property affected, and that no subsequent transaction shall affect the title unless the writing evidencing such be filed with the registrar and a memorandum thereof be entered in the register of titles, along with the decree; that the record of such entries shall be known as a certificate of title and shall be conclusive evidence of the title. A single page, therefore, is presumed to show conclusively the actual state of the title at all times.

## INITIAL PROCEEDINGS.

The objection has been made that those provisions of statutes which relate to initial proceedings are unconstitutional.

It will be well to keep in mind that a statute providing for the quieting of title against all persons must satisfy not only the State court of last resort but also the United States Supreme Court, for while it is true that, if a State court of last resort declares a statute of the State unconstitutional, there is no right of appeal to the United States Supreme Court, at the same time, if the State court declares a statute constitutional, there remains the right of appeal to the United States Supreme Court on the question of the constitutionality of the law. Under section 709, Revised Statutes, the final decree of a State court may be examined into by the United States Supreme Court—

where is drawn in question the validity of or an authority exercised under a statute of any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity. (*Columbia Water Power Company v. Street Railway Company*, 172 U. S., 475; 43 L. Ed., 525.)

It is to be kept in mind also that the constitutionality of statutes will be tested by what may be done under them and not by what

has been done in a specific case; if a statute authorizes in any manner a procedure which does not constitute due process of law, it is to that extent at least unconstitutional.

It was said by Judge Earl in *Stuart v. Palmer* (74 N. Y., 183), that "the constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done."

The specific objection made is that the statutes do not provide for "due process of law."

In *Ballard v. Hunter* (204 U. S., 241) it is said: .

A precise definition of "due process of law" has never been attempted. It does not always mean proceedings in court. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case.

In quiet-title suits against all persons, four classes of persons are affected as defendants and are entitled to due process of law in order that they may be brought before the court and be bound by its decree. They are:

- (1) Known residents of the State.
- (2) Known residents of the State who can not be found.
- (3) Known nonresidents of the State.
- (4) Unknown persons, whether in being or not, whether minors or under other disability, and whether residents or nonresidents of the State.

Mr. Justice Moody in *Twining v. New Jersey* (211 U. S., 78; 53 L. Ed., 97), said:

Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction; and that there shall be *notice and opportunity for hearing* given the parties. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all State laws, statutory or judicially declared, regulating procedure, evidence, and methods of trials, and held them to be consistent with due process of law.

In *Arndt v. Griggs* (134 U. S., 316; 33 L. Ed., 918), the court, speaking through the then Mr. Justice Brewer, said:

The well-being of every community requires that the title to real estate therein shall be secured, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the General Government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution or against natural justice.

The notice and manner of service required by the several title registration statutes in initial proceedings have been set out in the accompanying comparative study. While the manner of service is found to differ, it is at least required in all statutes that notice of the

proceeding be served upon all resident and nonresident known defendants in a manner customary in other civil actions in the State and held to be sufficient by the supreme court of the State involved; the same is true of all known resident defendants who can not be found.

Therefore, the only remaining question is, Can binding service be made upon the fourth class—unknown persons, whether resident or nonresident, and whether minors or under other disability?

All statutes providing for registration of title require that notice be given to the fourth class by publication.

In *Ballard v. Hunter*, supra, Mr. Justice McKenna said:

It should be kept in mind that the laws of a State come under the prohibition of the fourteenth amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law can not give personal notice of its provisions or proceedings to everyone. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal if it would give efficiency to many of its exercises. This was pointed out in *Huling v. Kaw Valley R. & Improvement Co.* (130 U. S., 559; 32 L. Ed., 1045; 9 Sup. Ct. Rep., 603), where *it was declared to be the duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to get notice by the ordinary publications which have been usually required in such cases it is his misfortune, and he must abide the consequences.*

In *Arndt v. Griggs*, supra, it is said:

It (the State) can not bring the person of a nonresident within its limits, but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable method of imparting notice.

The court further said:

The various decisions of this court establish that, in its judgment, a State has power by statutes to provide for the adjudication of titles to real estate within its limits as against nonresidents who are brought into court only by publication.

In *American Land Company v. Zeiss* (219, U. S. 47; 55 L. Ed., 95, 1910) Mr. Chief Justice White quoted with approval the following language from *Title and Document Restoration Company v. Kerigan* (150 Cal., 289):

Applying the principles which have led the courts in cases like *Arndt v. Griggs* and *Perkins v. Wakeham* (86 Cal., 580; 21 Am. St. Rep., 67; 25 Pac., 51) to sustain judgments quieting titles against nonresidents upon substituted service, why should not the legislature have power to give similar effect to such judgments against unknown claimants where the notice is reasonably full and complete? The validity of such judgments against known residents is

based upon the grounds that the State has power to provide for the determination of titles to real estate within its borders, and that, as against nonresident defendants or others, who can not be served in the State, a substituted service is permissible, as being the only service possible. *These grounds apply with equal force to unknown claimants.* The power of the State as to titles should not be limited to settling them against persons named. In order to exercise this power to its fullest extent, it is necessary that it should be made to operate on all interests, known and unknown.

The case of *American Land Company v. Zeiss*, supra, involved the identical questions involved in land title registration statutes in so far as they relate to the power of the State to deal with the subject matter and the sufficiency of the service of notice of the initial proceeding. That case brings into question the validity of a California statute providing for the establishment of titles in cases where the records have been destroyed by fire or earthquake. *Notice and service in all respects similar to that under land title registration statutes are provided for in the California statute considered in the American Land Company case.* The statute was held to be sufficient in all of its requirements. In the opinion Mr. Chief Justice White said:

As no complaint is made concerning the provisions of the statute relating to the designation of and notice to known claimants, we put that subject out of view and address ourselves to the provisions relating to unknown claimants or claims. The action which the statute authorizes may be brought by "any person who claims an estate of inheritance or for life in, and who is by himself or his tenant or other person holding under him, in the actual and peaceable possession of any real property" situated in a county where "the public records in the office of a county recorder have been lost or destroyed, in whole or in any material part, by flood, fire, or earthquake." In the caption of the complaint the statute requires that the defendants shall be described as "all persons claiming any interest in or lien upon the real property herein described, or any part thereof." The summons is required to contain a description of the property affected by the suit, and to be directed to "all persons claiming an interest in or lien upon the real property herein described, or any part thereof." The summons is to be published at least once a week for two months, and the defendants are commanded to appear and answer within three months after the first publication of the summons. A copy of the summons is required to be posted in a conspicuous place on each separate parcel of the property described in the complaint within 15 days after the first publication of the summons. At the time of filing the complaint a notice of the pendency of the action, giving, among other things, a particular description of the property affected thereby, must be recorded in the office of the recorder of the county in which the property is situated, and it is made the duty of the recorder to enter, "upon a map or plat of the parcels of land, to be kept by him for that purpose, on that part of the map or plat representing the parcel or parcels so described, a reference to the date of the filing of such notice, and, when recorded, to the book and page of the record thereof." In considering the statute we are bound by the construction affixed to it by the supreme court of the State, and therefore treat as embraced within its terms that which the highest court of the State has declared the statute exacts, either expressly or by necessary implication. In the *Kerrigan* case, supra, it was held that the

result of the provisions of the statute was "to require the complainant to designate and to serve as known claimants all whom, with reasonable diligence, he could ascertain to be claimants"—a construction which in effect declared that the statute prohibited the omission of a known claim or claimant, upon the conception that the rights of such claim or claimant would be foreclosed by the general designation and notice prescribed for unknown claimants. And in *Hoffman v. Superior Court* (151 Cal., 386; 90 Pac., 930), where the doctrine of the *Kerrigan* case was reiterated and applied the court, after holding that the statute requires the plaintiff in his affidavit to allege in terms "that he does not know and has never been informed" of any adverse claimants whom he has not specifically named, pointed out that failure of the plaintiff to make inquiry or to avail himself of knowledge which would be imputed to him because of facts sufficient to put him on inquiry as to the existence of adverse claims would be available "in any subsequent attack upon the decree, upon the ground that there was extraneous fraud of the plaintiff in making a false affidavit to obtain jurisdiction."

It is to be borne in mind that it has been settled (*Griffith v. Connecticut*, 218 U. S., 563; 54 L. Ed. 1161; 31 Sup. Ct. Rep., 132, and cases cited) that the fourteenth amendment does not operate to deprive the States of their lawful power, and of the right, in the exercise of such power, to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful State power, since they are so unreasonable and unjust as to impair or destroy fundamental rights.

It is to be observed that the statute not only requires a disclosure by the plaintiff of all known claimants, but, moreover, at the very outset, contains words of limitation that no one not in the actual and peaceable possession of property can maintain the action which it authorizes. No person can therefore be deprived of his property under the statute unless he had not only gone out of possession of such property and allowed another to acquire possession, or, if he had a claim to such property or an interest therein, had so entirely failed to disclose that fact as to enable a possessor to truthfully make the affidavit which the statute exacts of a want of all knowledge of the existence of other claimants than as disclosed in his affidavit. Besides, it is to be considered that the statute, as construed by the California court, imposed upon the one in possession seeking the establishment of an alleged title the duty to make diligent inquiry to ascertain the names of all claimants. Instead, therefore, of the statute amounting to the exertion of a purely unreasonable and arbitrary power, its provisions leave no room for that contention. On the contrary, we think the statute manifests the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants, and to give such notice as, under the circumstances, would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. To argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the State to deal with the subject.

\* \* \* \* \*

While we are of opinion that the view just stated demonstrates the want of merit in the contention that the statute, because of the insufficiency of its requirements, was repugnant to the fourteenth amendment, a consideration of a provision of the general law of California, which, by the construction of the Supreme Court of California, is incorporated into the statute under consid-

eration, would lead to the same result. Thus, in the *Hoffman* case, the court said :

“In this connection it is proper to say that, in determining whether or not due process of law is afforded, other statutes applicable to the proceeding may be considered. The provisions of section 473 of the Code of Civil Procedure apply in such cases. Any person interested in the property, and having no actual notice of the decree, may come in at any time within a year after its rendition, and by showing that he has not been personally served with process, and stating facts constituting a good defense to the proceeding—that is, facts sufficient to show that he has a valid adverse interest in the property—he may have the decree vacated as to him, and be allowed to answer to the merits.”

The right conferred by section 473 of the code, it is to be observed, is an absolute right, although the section declares that the court may impose “such terms as may be just.” (*Holiness Church v. Metropolitan Church Association*, 12 Cal. App., 445; 107 Pac., 635. *Gray v. Lawlor*, 151 Cal., 352; 90 Pac., 691; 12 A. and E., Ann. Cas., 990.)

Under this construction it might well be held, if it were necessary to do so, as establishing a rule of limitation which it was in the power of the State to prescribe, in view of the circumstances to which the limitation was made applicable.

All registration statutes expressly provide that a decree entered in pursuance of their provisions shall bind all classes of persons enumerated hereinabove and that it shall be no exception that any one served, as provided, is under a disability. It is within the legislative power to except minors and others under disability from the effect of a statute or to include them; if included, a decree becomes as binding upon such as if the disability did not exist.

It is urged that because the plaintiff in error was a minor when this law went into operation, it can not affect her rights. But *the Constitution of the United States*, to which appeal is made in this case, *gives to minors no special rights beyond others*, and it was within the legislative competency of the State of Louisiana to make exceptions in their favor or not. The exemptions from the operation of statutes of limitation, usually accorded to infants and married women, do not rest upon any general doctrine of the law that they can not be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to assert their rights. (*Vance v. Vance*, 108 U. S., 514; 27 L. Ed., 808.)

In view of the foregoing authorities there appears no ground for reasonable doubt as to the validity of the initial proceeding for registration of title and the conclusive and binding quality of the decree upon “all persons,” provided the statute is reasonable, has been followed in the case, and all persons entitled to actual notice have been served.

#### TRANSACTIONS SUBSEQUENT TO ORIGINAL PROCEEDINGS.

The statutes provide that no transaction subsequent to original registration shall affect the title unless a memorandum thereof be entered upon the register of titles upon the page (continuation)

upon which the decree quieting the title and ordering registration is entered. All entries are to be made by an official, designated "registrar," to whom are presented for filing all writings purporting to affect registered titles and whose duty it is to note upon the register *the effect* of the writing presented.

It is not required that notice be given by registrars before making an entry upon the register of titles except in a few instances of minor concern here. This course of procedure has been attacked upon the ground that it attempts to bestow upon registrars, who are admittedly ministerial officers only, powers which are judicial, and also upon the ground that the procedure is unconstitutional in that it attempts to deprive of property without due process of law.

The two grounds of attack seem to be correlated. If the duties imposed upon registrars by the statutes be the exercise of judicial powers, then both grounds of objection to the procedure would appear to be good, for clearly a ministerial officer can not exercise functions which are wholly judicial, nor can judicial power be exercised in the premises without due process of law. There is no contention on the part of those accepting the statutes as valid that, in proceedings after original registration, there is "due process of law," except in a few specified instances in some of the statutes wherein judicial proceedings are required but which are not determinative of the question here considered; on the contrary, the claim is that the proceedings are not judicial but ministerial only and consequently no notice (or "due process") is required.

It is true also that it is in no way unconstitutional that a statute does not require any notice whatsoever as a condition precedent to the exercise of a ministerial act, yet such duties must be performed in an orderly manner in which the citizen has an opportunity to protect his rights. (*Turpin v. Lemon*, 187 U. S., 51-57.)

*Is the exercise of the powers and duties of registrars ministerial or judicial?*

The State of Illinois was the first of the States to pass a land-title registration act; that act made no provision for conduct of the initial proceeding in court, but provided for the submission of the original petition to the registrar, committing to him the determination of ownership upon an application for initial registration. The Supreme Court of Illinois held the act unconstitutional upon the ground that its provisions in this regard attempted to commit to the registrar the question of determination of ownership and thereby sought to confer upon that officer judicial power. (*People v. Chase*, 165 Ill., 527.)

Thereafter a new statute was passed in Illinois (1897) in which provision was made for an initial proceeding to be conducted by a court as the basis for initial registration of title, leaving to the

registrar the duty of issuing the certificate of title after decree and the reissuing of certificates upon transfers made subsequent and the entry of all transactions subsequent to initial registration. The constitutionality of the statute of 1897 was regularly contested and upon appeal the provisions giving to registrars the power to issue certificates and enter transactions subsequent to initial registration were held to be constitutional (*People v. Simon*, 176 Ill., 165), the court holding that the exercise of such functions was ministerial, and, at most, only quasi judicial. In the opinion the following language is used:

From these authorities, it is apparent that the mere fact that the registrar is required by this act to inquire into the existence of certain facts, and to apply the law thereto, in order to determine what his official conduct shall be, and that his action may affect private rights, does not constitute the exercise of judicial power, strictly speaking. It is not the intention of these two sections (60 and 47) to provide a tribunal for the adjudication of disputes concerning land titles. The primary purpose is the issuing of the certificate, and the exercise of the judgment of the registrar is incidental. The prohibition in question "has never been held to apply to those cases where judgment is exercised as incident to the execution of a ministerial power." (*Owners of Lands v. People*, supra.) The powers exercised by the registrar under this law are analogous to those exercised by the Commissioner of Patents. A power of decision is given to that officer in many matters, not only between the Government and the patentee, but also between different claimants, as to priority, patentability, and like matters, and in the performance of these duties it has never been considered that he was encroaching upon the judicial domain.<sup>1</sup> They are also, in a measure, like the duties performed by officers of the Land Office. Duties of a similar nature, involving judgment or discretion, and the application of the law to the facts, are devolved both under the State and Federal laws upon many other executive officers, legally. In some instances it is even held that in the exercise of such judgment the officer is free from judicial interference. But in the case of the registrar this act provides that any person feeling himself aggrieved by the act or neglect of this officer, in any matter pertaining to the duties required of him, may file a petition in equity in the proper court, making the registrar and other persons interested parties defendant, and that the court may proceed therein as in other cases in equity, and may make such order or decree as shall be according to equity in the premises and purport of the act. *This, with the well-known jurisdiction of the courts in mandamus, injunction, rescission, cancellation, bills of relief, and the like, will effectually protect the citizen against arbitrary conduct on the part of the officer.*

Ohio was the second State to pass such a law. It is conceded everywhere that the act was crudely drawn and undoubtedly unconstitutional because of failure to provide adequate notice to claimants in initial proceedings and the granting of excessive powers to registrars. It was held to be unconstitutional in *State v. Guilbert* (56 Ohio St.,

<sup>1</sup>As in regard to patents for land, however, so in regard to patents for inventions, the proper officer issues the grant when he has evidence satisfactory to his own mind that the claimant is entitled to receive it; but that adjudges nothing as to the real right. (*Wilder v. McCormick* (U. S.), 29 Fed. Cas., 1220-1221.)

575). In that case it is said with reference to the powers of registrars here under consideration:

It is further urged that the act is void because it attempts to confer judicial power on the recorder. Counsel agree that power of that character can not be conferred upon a ministerial officer, but in support of the act it is urged that the powers indicated are ministerial, and not judicial. The principal powers conferred are to take proof after notice to the holder that a mortgage has been discharged, and after a hearing, to enter a discharge upon the register; to make an entry that a lien has become inoperative in law by reason of limitation of time when application has been made therefor, the person interested notified, and he is satisfied that such is the fact; to correct memorials made or issued by mistake, if the rights of bona fide purchasers or lien holders for value have not intervened. It is true that the power to ascertain and decide is not necessarily a judicial power, and it is frequently exercised by ministerial officers and legislative bodies. Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination. While it is not supposed that any definition of judicial power, sufficient for all conceivable cases, has ever been attempted, it is clear that "to adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws is the peculiar province of the judicial department." (Cooley, Const. Lim., 109.) Recurring to the duties of the recorder under the act, he is not merely to enter the evidence furnished by the agreement of the parties that a lien has been discharged, or that it has become void by the lapse of time, or that a mistake has intervened touching their rights, but he is to apply the rules of evidence to the ascertainment of disputed facts; to apply the rules of law concerning payment; to interpret and apply the statute of limitations as it may affect the enforcement of liens, including such questions of disability as may arise; to decide the questions of fact and law that may arise in determining whether mistakes have intervened, and who are bona fide purchasers; and that to make an entry which is to have the same effect in concluding the rights of the adversary parties as would a decree in equity. That these are judicial powers is entirely clear. They seem to have been so regarded by the general assembly, for there is a provision for appeal from the decisions of the recorder. This is not supposed to include all the judicial powers which the act assumes to confer on the recorder, but it is sufficient for present purposes.

Nor is this objection to the act avoided by the provisions which contemplate a review of or appeal from the action of the recorder. It would, perhaps, be found upon a careful consideration of his powers that they are not all embraced within the provisions for review or appeal. But the assumption that they are so embraced would not validate the act in this respect. The recorder, as a ministerial officer, is incompetent to receive a grant of power from the legislature. His acts in the attempted exercise of such powers are necessarily nullities. They can not be effective to impose any obligation or burden upon a citizen, or to deprive him of any right. The act plainly contemplates that the person against whom the recorder decides in the exercise of any of the powers sought to be conferred must either submit to the adverse decision, or take upon himself the burden of an appeal. In view of the constitutional provision on the subject, he can not be forced to this alternative. If these are judicial powers, it is admitted that they can not be vested in the recorder. If they are not judicial, the provisions of an appeal are void, since as was said by this court in *Ex parte Logan Branch Bank* (1 Ohio St., 432) "we have no

idea of an appeal, except from one court to another." An examination of *People v. Chase* ((Ill. Sup.) 46 N. E., 454) will show that in some of its aspects the act under consideration, though differing from the act passed by the Legislature of Illinois to accomplish the same purpose, is within the principles upon which that act was held void.

The Illinois case, *supra*, and the Ohio case are commonly said to conflict. The Illinois case holds merely that the registrar has the power to make entries; by inference at least it clearly implies that such entries are not conclusive; it states that "*this, with the well-known jurisdiction of the courts in mandamus, injunction, rescission, cancellation, bills of relief, and the like, will effectually protect the citizen against arbitrary conduct on the part of the officer.*" The Ohio case is directed to the question of conclusiveness of acts of registrars rather than the power as conferred by the Illinois statute. Both cases are of the same import in that they hold that the powers of registrars can not be judicial and hence their acts can not be conclusive.

Massachusetts took up consideration of land title registration law about the same time as did Illinois, both States having given official attention to the subject in 1891. The Massachusetts act, however, was slower in passage and did not become a law until 1898. The question of the constitutionality of the provisions bestowing upon registrars their powers has been tested before the supreme court of that State and upheld. In *Tyler v. Judges of the Court of Registration* (175 Mass., 71), Chief Justice Holmes, now a member of the United States Supreme Court, wrote the opinion. In it he said:

*The other objection to the constitutionality of the statute is with regard to the powers and duties of the recorder and assistant recorder. It is said that they are given judicial powers after the original registration, although not judicial officers under the constitution. The act of registration is the operative act to convey title (sec. 50), and by the act of 1898 the assistant recorder does it, unless in doubt (secs. 53, 55, 57, 61, 62, 63). It is said that, as his decision affects title, it must be judicial. But here again it is necessary to use a certain largeness in interpreting broad constitutional provisions. The ordinary business of registration is very nearly ministerial. There is no question to be raised, or which can be raised. If there is a question, either raised by any party in interest or occurring to the assistant recorder, it is to be referred to the judge for decision (sec. 52). But whatever may be thought of the original act, by amendment even the ordinary business is to be done only "in accordance with the rules and instruction of the court." (St. 1899, c. 131, sec. 8.) Under this amendment registration is the act of the court. The fact that it may be done by the assistant recorder under general orders when there is no question is not different from the power of the clerk to enter judgment in cases ripe for judgment under a general order or rule of the superior court. It should be observed by section 55 the production of the owner's duplicate certificate, whenever any voluntary instrument is presented for registration, is conclusive authority from the registered owner for the entry of a new certificate or the making of a memorandum of registration, and that a registration procured by presenting a forged certificate, etc., is void.*

Finally, it is said that there is no provision for notice before registration of transfers or dealings subsequent to the original registration. It must be remembered that at all later states no one can have a claim which does not appear on the face of the registry. The only rights are registered rights, and when land is brought into the registry system there seems to be nothing to hinder the legislature from fixing the conditions upon which it shall be held under that system. (*People v. Simon*, 176 Ill., 165, 176.) By section 45 the obtaining of a decree of registration, which is a voluntary act, is an agreement running with the land that the land shall be and remain registered land and subject to the provisions of the act. Furthermore, in deciding whether substantial justice is done, it is to be borne in mind that ordinary cases will present no question at all. It is contemplated, as we have said, that, *if there is a question to be discerned, it shall be referred to the court*, and of course that the court will order notice to any party interested. The act shows throughout the intent that no one shall be concluded without having a chance to be heard; and although some of its methods are new to this Commonwealth, we can not say that the precautions as to notice are insufficient in substance or form.

Likewise the courts of last resort of other States have considered the constitutionality of the provisions in statutes bestowing similar powers and duties upon registrars and upheld them.

In *Robinson v. Kerrigan* (151 Cal., 49) is said:

The point is that the registrar is required to determine the legal effect of these instruments, and that this is a judicial function which can be given only to a judicial officer. *There is no force to the objection.* Every administrative officer is frequently called upon, in the discharge of his duties, to decide questions of law relating thereto. The recorder is required to determine whether an instrument presented for record is a deed, a mortgage, a lease, a notice of action, or what not, so as to record it in its proper book. The sheriff must often determine, for his own guidance in making a levy, the ownership of property. The clerk must determine the nature and legal effect of papers filed with him, and perform the appropriate duty respecting them. The duties required of the registrar by these sections are of the same nature. *His decision in the matter is not conclusive.* If he decides wrongfully and refuses to perform the appropriate duty in the premises, he may be compelled to act properly by means of a writ of mandamus, the same as any other ministerial officer who mistakes his duty under the law and refuses to perform it. The exercise of such powers by ministerial officers is a necessary function of the executive department, and although it may require similar deliberation to that involved in the exercise of judicial power, the bestowal of such powers upon the executive department does not violate the provisions of the constitution forbidding that department to exercise the functions of any other department. (*People v. Simon*, 176 Ill., 165 (68 Am. St. Rep., 175; 52 N. E., 910); *Owners v. People*, 113 Ill., 296; 1 Story on Constitution, 5th Ed., sec. 525.)

The principle involved is stated by the Supreme Court of Kansas in the case of *Railway Company v. Simonson* (57 L. R. A., 765), as follows:

A statute which declares what shall be taken as conclusive evidence of a fact is one which, of course, precludes investigation into the fact, and itself determines the matter in advance of all judicial inquiry. If such statutes can be upheld there is then little use of courts, and small room, indeed, for the exercise of their functions.

The existence of certain facts creating a condition which holds for a stated period of time, however, may conclude all rights in the subject matter. Of such is possession which ripens into title; or a holding under such circumstances as may start running a statute of limitations which bars any proceeding to recover or establish any interest in the property. With reference to such it is said in Cooley's Constitutional Limitations, fifth edition, 453, that:

Except in those cases which fall within the familiar doctrine of estoppel at the common law, *or other cases resting upon like reasons*, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it.

Unquestionably the weight of authority favors the constitutionality of the provisions relating to powers and duties of registrars.

It is equally clear that decisions of registrars are not conclusive but may be reviewed by court in an appropriate proceeding in "mandamus, injunction, rescission, cancellation, bills of relief, and the like;" if such entries are not conclusive but are the subject of judicial review, a certificate of title issued upon the strength of the entries can not, of course, become immediately available as conclusive evidence of an indefeasible title.

*In addition to lack of conclusiveness of certificates of title under the system due to the foregoing ground other reasons exist why such certificates are not conclusive.*

Failure to follow the statute in initial proceedings or in probate and other judicial proceedings after original registration may result in lack of jurisdiction or in such irregularity as to render a decree inconclusive. Such defects can be overcome only by retention of possession or the running of a statute of limitations providing for title by adverse possession or barring the right to maintain an action to recover the land. Such is true, however, of all initial registration proceedings as well as of subsequent transfers based upon court proceedings.

But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. (*Saranac Land and Timber Co. v. Roberts*, 177 U. S., 318; 44 L. Ed., 792.)

Upon this point the New York commission which drafted the statute in that State said:

It is admitted, of course, that in a case in which because of the court's failure to follow the statute an interested party was not duly served, possession by the registered owner might be necessary to cause the running of a statute of limitations. (*People v. Ladew*, 189 N. Y., 355; *People v. Golding*, 55 Misc., 425, 440.)

The acts of all States either rest upon an assumption of regularity in probate and other judicial proceedings affecting a registered title and authorize a transfer, upon presentation of a final decree entered in such proceedings, as conveying an indefeasible title or require a hearing before issuance of a new certificate, but leave publication of notice optional with the clerk or court.

The Minnesota act (sec. 66) is typical of those which assume regularity in probate proceedings through which title passes. It is as follows:

When the owner of registered land, or of any estate or interest therein, dies, having devised the same by will, the persons entitled thereto may file with the registrar a certified copy of such will, together with a certified copy of the order of the probate court, admitting it to probate, and of the final decree of the probate court assigning the same, together with the duplicate certificate issued to the testator, and thereupon the registrar shall cancel the duplicate certificate issued to the testator and issue a new duplicate certificate or certificates to the persons designated in such final decree.

The Massachusetts act (sec. 91) is typical of those which require a petition but leave publication of notice to unknown claimants discretionary with the court. The section is as follows:

Upon the death of a registered owner his heirs at law or devisees, upon the expiration of thirty days after the entry of a decree of the probate court granting letters testamentary or of administration, or in case of an appeal from such decree, at any time after the entry of a final decree, may file a certified copy of the final decree of the probate court and of the will, if any, with the assistant recorder, and make application for the entry of a new certificate. The court shall issue notice to the executor or administrator and to all other persons in interest, *and may also give notice by publication* in such newspaper or newspapers as it may consider proper, to all whom it may concern, and after a hearing, may direct the entry of a new certificate or certificates to the person or persons entitled as heirs or devisees. Any new certificate so entered before the final settlement of the estate of the deceased owner in the probate court shall state expressly that it is entered by transfer from the last certificate by descent or devise, and that the estate is in process of settlement. After the final settlement of the estate in the probate court, or after the expiration of the time allowed by law for bringing an action against an executor or administrator by creditors of the deceased, the heirs at law or devisees may petition the court for an order to cancel the memorandum upon their certificate, stating that the estate is in course of settlement, and the court, after notice and a hearing, may grant the petition; but the liability of heirs or devisees of registered land for claims against the estate of the deceased shall not in any way be diminished or changed.

Such a provision would be ample in ordinary transactions under the customary manner of determining titles, for probate proceedings would be examined into before passing a title; but the very object of registration is to obviate the necessity of examination. A careful judge would always require notice by publication before ordering registration if after examining into the probate proceed-

ings any reasonable necessity therefor were found to exist; yet should such publication be not made, the order of registration could not bind persons whom the decree of distribution did not bind by reason of lack of notice. The exceptional character and object of a registration proceeding appear to have been overlooked in this regard, unless the statutes be based upon a theory of assumptions of regularity in judicial proceedings and conclusiveness thereof when registered.

In those acts which provide for accepting decrees of distribution as conclusive, clearly, if for lack of regularity the probate court should not have jurisdiction to make such decree of distribution the decree would not be conclusive; a title registered upon the strength of the decree could be no stronger than the decree itself, nor could it be made indefeasible by legislative declaration. The same is true in all cases where title is transferred through judicial proceedings upon presentation of decree merely.

*The assumption of regularity in probate and other judicial proceedings seems to put a burden upon the system which makes impossible the immediate acceptance of certificates, issued under any act, as conclusive, or of any title, evidenced by such certificate, as indefeasible.* Such assumptions cloud all certificates of title under the system. Instances of actual loss would no doubt be few, but a cloud of uncertainty is cast over all.<sup>1</sup>

*Does it follow that the title certificate plan can not be given practical effect in the United States?*

In *Tyler v. Judges*, supra, Judge Holmes said:

Prescription or a statute of limitations may give a title good against the world, and destroy all manner of outstanding claims without any notice or judicial proceeding at all. Time and the chance which it gives the owner to find out that he is in danger of losing rights are due process of law in that case.

In *Turner v. New York* (168 U. S., 90; 42 L. Ed., 392) the decision establishes:

(1) That statutes of limitations are within the constitutional power of the legislature of the State to enact.

(2) That a limitation of two years is not unreasonable.

In the opinion Mr. Justice Gray said:

It is well recognized that a statute shortening the period of limitation is within the constitutional power of the legislature provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect. \* \* \* The statute now in question relates to land sold and conveyed to the State for nonpayment of taxes; it applies to those cases only in which the conveyance has

<sup>1</sup>In the accompanying study of all statutes the extent of the existence of such provisions in the several acts is pointed out under the heading of "Provisions in the several statutes which draw in question the conclusiveness of certificates."

been of record for two years in the office where all conveyances of lands within the county are recorded, and it does not bar any action begun within six months after its passage.

In *Saranac Land & Timber Co. v. Roberts* (177 U. S., 318; 44 L. Ed., 792) there is the following language:

A curative act in the ordinary sense of that term is a retrospective law, acting on past cases and existing rights. The power of the legislature to enact such laws is therefore confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings, or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements. (Cooley, Const. Lim., p. 454.) A very full enumeration of the cases in which the legislature may properly exercise this power is to be found in *Forster v. Forster* (129 Mass., 559). But there may be in legal proceedings defects which are not mere informalities or irregularities, but *so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. This principle does not apply to a statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right.* (*Terry v. Anderson*, 95 U. S., 628; 24 L. Ed., 365; *Turner v. New York*, 145 N. Y., 451; 40 N. E., 400.) *Ensign v. Barse* (107 N. Y., 329; 14 N. E., 400; 15 N. E., 401) was strictly a case of a retrospective statute, for no period of time was given within which any party affected could assert his rights. The same is true of *Cromwell v. MacLean* (123 N. Y., 474; 25 N. E., 932). In *Joslyn v. Rockwell* (128 N. Y., 334; 28 N. E., 604), as well as in the two cases of *People v. Turner*, all of which arose under the statute of 1885, there is to be found a discussion of defects which it was claimed were jurisdictional, and not cured by that act. *Such discussion, however, is not to be construed as authority for the proposition that jurisdictional defects in legal proceedings which are beyond the scope of retrospective legislation will equally take a claim out of the bar of a statute of limitations.* The existence of such defects was necessarily considered in the authorities cited, because the statute of 1885 in terms exempted from its operation cases where the taxes had been paid, or where there was no legal right to assess the land on which they were laid. There is no exception, however, as to defects in notices of redemption or in their publication; on the contrary, it is expressly provided that the comptroller's deed, after the lapse of the requisite time, shall be conclusive evidence that "all notices required by law to be given previous to the expiration of the two years allowed by law to redeem were regular and regularly given."

These considerations dispose also of the other objections to the assessment and sale.

From the foregoing authorities it appears that a statute which provides that, upon expiration of a stated period, a record shall be deemed conclusive may have the effect of a statute of limitations. It does not appear, however, that a legislative enactment declaring that a record immediately upon entry shall be conclusive may have such effect, for conclusiveness in event of irregularity is the result of the lapse of time and not of the legislative declaration.

It is specifically pointed out, in the accompanying study of all statutes, which of the statutes, as to their curative provisions, are so framed that such provisions may be construed as statutes of limitations and hence as sufficiently providing for decrees of original registration which will become absolutely conclusive upon running of the statute and after what period of time. It is also pointed out which of the statutes so provide by way of curative clauses and expressed statutes of limitation as to assure a conclusive certificate based upon transfers subsequent to original registration and after what period of time.

It is provided by certain land registration statutes that certificates of title showing original registration may be accepted immediately upon entry as conclusive of the title, since, it is argued, if a person should be deprived of a right in the property by reason of the decree of registration, recourse to the assurance fund provided by the statutes is open to him. Upon the same theory nearly all statutes provide for acceptance of certificates issued subsequent to original registration immediately upon entry. While this subject is discussed in many decisions, the rule seems nowhere to have been expressed more clearly than in *Gillman v. Tucker* (28 N. E., 1040 (N. Y.)), wherein it is said:

The plaintiff contends that the statute is unconstitutional, because it deprives the owner of his property without due process of law, and we are of the opinion that the claim is well founded. It can not be the subject of doubt that an act of the legislature which provides for an involuntary transfer of property from one person to another without due process of law, whether with or without compensation, violates the principles of the fundamental law, whatever may be the pretext upon which it is founded. It was said by Justice Jewett, in *Embury v. Conner* (3 N. Y., 511), after a review of the authorities: "I think these decisions should be regarded as having settled the point that a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, although compensation be made."

## CONCLUSIONS.

A review of the decisions affecting land title registration in the United States is convincing of the following propositions:

### I.

That proceedings in which a decree may be made confirming the title to land against the whole world, without exception, may be provided by statute.

### II.

That the necessary powers and duties conferred upon "registrars" under land title registration statutes can be properly bestowed.

## III.

That decrees of initial registration can not be made immediately conclusive upon entry, at least as to jurisdictional and other substantial matters as to which irregularity exists, but only by the running of a statute of limitations after entry.

## IV.

That the acts of such registrars are not and can not be made conclusive immediately upon entry, but that they can be made so by the running of a statute of limitations after entry.

## REPORT ON LAND TITLE REGISTRATION LAWS IN THE UNITED STATES.

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As is known to all students of land title registration law, the registration system, as applied in England and generally throughout British dependencies, is the result of an idea and the work of Sir Robert Richard Torrens, born in Ireland in 1814, educated at Trinity College, Dublin, collector of customs at Adelaide in 1841, and afterwards the first premier of South Australia. His idea was to apply the principles of registration of ownership in ships to registration of title to lands—that is, to have land ownership conclusively evidenced by certificate and thereby made determinable and transferable quickly, cheaply, and safely.

The idea gained favor in Australia, resulting in the framing of what became known as the Torrens Act and the adoption of the system in practically all Australia not later than 1870. Before his death, in 1888, Sir Richard had the pleasure of seeing the system, though greatly varying in essentials from the original, adopted in England, Ireland, the greater part of Canada, and many other British dependencies.

It is frequently said that the system of land title registration was originated by Torrens, but records, showing systems of registration of title to lands in portions of Europe, are extant dating back as far as 1386; of such, however, the writings of Torrens make no mention.

The Torrens law, as originally drawn, has been greatly modified in the statutes enacted in the United States, yet the salient feature of registration by certificate has been retained and the law is usually referred to as the Torrens law wherever a statute providing for registration of title to land has been enacted in this country.

Acts embodying the basic principles of title registration by certificate have been passed in 19 States of the United States, in Hawaii, the Philippine Islands, Guam, and Porto Rico. While the principles involved in the acts of the several States and islands are the same and the objects to be accomplished by them are identical, such acts differ widely in many respects. Some such differences are due, of course, to the necessity of conforming to existing State laws of procedure or to the plan of distribution of judicial and ministerial duties, and do not go to the merits of the system as such or its suc-

cess in-operation. There are other matters, however, as to which differences exist, which are more important.

It will serve no useful purpose to enter upon a discussion of the first-mentioned class of differences; by such reference is made to the like of whether the clerk of the court having jurisdiction of the proceeding to register the title, or the county recorder or some other person should be registrar of titles under such a law; they are matters of local concern and appear not to affect the validity or practicability of the scheme. Pointing out the last-mentioned and more material differences, however, may serve to make it possible to determine the merits of certificates of title issued under the several statutes and for disinterested minds to decide which of conflicting provisions in the several acts should reasonably be expected to tend most to the successful operation of a title registration system. All material differences have accordingly been noted in an accompanying comparative study of the title registration acts of the several States.

Torrens stated that the purposes of the law which he advocated are "to simplify, quicken, and cheapen the transfer of real estate and to render titles safe and indefeasible." These objects, he planned, should be accomplished by means of registration of title and the use of certificates which conclusively show the state of title at all times.

The title of the registration acts in the several States varies in its statement of the subject. The title of the Illinois act is indefinitely worded "An act concerning land titles." The New York act is worded more clearly as to purpose, "An act in relation to registering titles of real property and facilitating and expediting its transfer." The title of the North Carolina act is "An act to provide for the assurance and registration of land titles." From the foregoing it appears that the titles of the registration acts vary in wording, which is so indefinite as to give no idea of the purpose of the act to a combined statement of the ultimate purpose and the means by which the purpose is to be effected. Both the ultimate purpose and the means of its accomplishment are partially stated in inverse order in the title of the California act. It is worded, "An act for the certification of land titles and the simplification of the transfer of real estate." In Colorado and Minnesota the title of the acts is the same as that of the Illinois act, and in these States, as well as in California, the title has been held by the supreme court of the State to be sufficient. It appears from the foregoing that the objects of this registration system have been stated as concisely and clearly by Torrens, himself, in the language above quoted, as by any later advocate of the system.

As a means of "simplifying, quickening, and cheapening the transfer of real estate and rendering titles safe and indefeasible" the plan of *registration of titles*, in distinction to registration of instruments

affecting title, was advanced. As provided by the Torrens Act, as originally drawn, however, the title could not be registered or rendered indefeasible in the United States, the original law not having been drawn with reference to constitutional restrictions such as obtain in this country. Notwithstanding the clear necessity of important departures from the original Torrens Act, in order to meet constitutional requirements, both Federal and State, the first title registration acts passed by legislatures in the United States did not provide against such requirements. The result was that the acts were held to be unconstitutional by the supreme court of the State in which they were tested. The decisions were rendered at a time when interest in land title registration laws was incipient but lively, and they had the natural effect of discouraging the advocates of land title registration and giving comfort to its opponents. It was on account of these circumstances, in part, that an impression was created that no valid registration law can be framed in the United States under the State and Federal Constitutions. There is due, however, to those pioneering such legislation the credit of having appreciated the fundamental idea of the system and of having laid the legal foundation for any system of land title registration which may be adopted in the United States, should the existing Torrens system prove impractical.

The objects of the law, the means by which these objects are sought to be accomplished and the fundamental legal questions involved are the same in the laws of the 19 States of the Union which have passed land title registration acts. The objects have been stated already in the quoted language of Torrens.

The initial proceeding adopted for accomplishing the objects of the system is a proceeding or suit to quiet title "against the whole world." In the law of each of the States a decree entered in pursuance of such a proceeding becomes the foundation of title. Upon the strength of such decree the title is entered in a book designated "register of titles," kept by an official called "registrar." The page upon which such entry is made is called the original certificate of title, and an owner's duplicate of the original certificate is issued. A record of all subsequent transactions affecting the title so registered is to be filed with the registrar, and the effect of such instruments noted by the registrar upon the original and duplicate certificate or any reissue thereof so long as such transactions continue in force. It is claimed that the status of the title as shown at all times by such registered certificate is conclusive, the decree entered in the initial proceeding having once become conclusive. The aim is to render it unnecessary at any time to go back of such certificate of ownership in an examination of title by making the certificate

conclusive evidence not only of ownership in fee but also of the full status of the title, including all encumbrances, liens, charges, assessments, or other dealings affecting the same.

Two main legal questions arise out of the foregoing procedure. They are:

(1) Is it possible in law to obtain a present starting point for official registration of title, back of which it is unnecessary to go for any purpose in an examination and determination of title? In other words, can any legal proceeding be maintained and prosecuted to a final decree which will quiet the title to real property against the whole world, known and unknown claimants, those residing within a State as well as those nonresident, those competent as well as those under disability, such as minors, insane persons, and those not in being?

(2) Can the duty or power to make entries and issue certificates of title after original registration, wherein the legal effect of instruments affecting the title is registered, be committed to a registrar, a ministerial officer?

Each of the foregoing questions has been considered in an accompanying brief and for the purpose of this report it will not be necessary to state more than that the authorities convincingly sustain the validity of both propositions.

While the basic legal questions involved should be answered favorably to the procedure adopted, as more fully appears from the authorities cited in the accompanying brief, other secondary legal questions arise which go to the validity of important provisions of the acts and seriously involve their practicability as they are now or can be drawn.

Torrens declared that one of the purposes of the title registration system is to "make titles safe and indefeasible." The Supreme Court of Minnesota aptly summarized the same matter by saying that "the statutes differ somewhat in their details, but the primary purpose of all is the creation of an indefeasible title."

All acts provide for the issuance of certificates which shall be conclusive of all matters affecting the title. If, as the system contemplates and all acts provide, certificates are to be accepted as the sole evidence of title, what they show must of necessity be conclusive, for an indefeasible title can follow, of course, such proceedings only as are conclusive.

The secondary legal questions which arise, therefore, relate to: (a) The conclusiveness of the initial decree and registration thereunder; (b) the conclusiveness of certificates based upon transfers subsequent to initial registration; (c) the indefeasibility of a registered title.

In considering the foregoing questions the legal conclusions contained in the following paragraphs are stated as the result of the reasoning and authorities set out in the accompanying brief.

(a) In all States the statutory proceedings leading to initial registration seem clearly sufficient to support a decree which becomes conclusive against the whole world upon expiration of the time within which an appeal may be taken, provided the statute has been followed. It does not result, however, that such decrees or certificates based upon them may be accepted as conclusive, for conclusiveness depends upon whether in the proceedings the statute has been followed. In event of failure to follow the statute in respect to a jurisdictional requirement or to serve with process all persons entitled to actual notice the authorities show that such a decree would not be conclusive, notwithstanding the acts provide that it shall be so; hence the registry of such decree can not immediately be accepted as conclusive of the state of title or at all in the absence of a statute of limitations, running for a reasonable length of time after entry of the decree of registration.

Such statutes of limitations are provided in the States named below, and run for the period of time set opposite the name of the States, respectively, as follows:

Illinois (sec. 27), 2 years.

California (sec. 45), 1 year.

Minnesota (sec. 27), 6 months.

Oregon (sec. 26), 2 years.

Colorado (sec. 29), 2 years.

Washington (sec. 29), 90 days.

New York (sec. 392), 6 months.

Ohio (sec. 22), 30 days. (Doubtful whether long enough.)

Nebraska (sec. 27), 2 years.

Massachusetts (sec. 13), 30 days. (Doubtful as such a statute; discussed in "Comparative study.")

Virginia (sec. 11), 90 days. (Doubtful as such a statute; discussed in "Comparative study.")

Tennessee (sec. 12), 1 year.

North Dakota (sec. 27), 6 months.

South Dakota (sec. 27), 6 months.

(b) And while the authorities satisfactorily show that the duties and powers conferred upon registrars are properly bestowed and that their exercise is within the functions of a ministerial officer, they also show clearly that a finding or decision by a registrar giving the effect of transactions affecting title can not constitutionally be made conclusive by the act of entry. Such is true in simple transactions involving only the construction of writings affecting title. Another serious circumstance is that all transfers subsequent to initial regis-

tration which are predicated upon the regularity of court proceedings, such as probate and foreclosure proceedings, remain subject to such procedure having been followed in such proceedings as is required by statute. Since the registration system contemplates no examination of records and certificates do not disclose through what proceedings the title has passed or in what manner it has devolved, thereby affording no opportunity to discover irregularities, whether in judicial proceedings or construction of deeds, trust instruments or other writings, it follows that no certificate involving transactions subsequent to original registration can be accepted as immediately conclusive, or at all in the absence of a statute of limitations running for a reasonable period of time after entry of such subsequent transactions.

Such statutes of limitations are provided by the following-named States only, and run for the period of time set opposite the name of the States, respectively, as follows:

Ohio (sec. 79), 3 days. (Most doubtful as a statute of limitations.)

Virginia (sec. 68), 90 days. (Doubtful as a statute of limitations; discussed in Comparative study.)

Georgia (sec. 59), 1 year. (The Georgia statute appears to be entirely sufficient as a bar against mistakes of the clerk (registrar), but does not provide against irregularity in judicial proceedings subsequent to initial registration.)

The statutes of limitations conflict with the very theory upon which the system is planned to operate, namely, a conclusive certificate available at all times, but it seems that it would be more desirable to change the theory of the system than to attempt to ignore so fundamental a principle of law as that which makes the statutes of limitations advisable.

(c) It appears, therefore, that, while in countries which are not confronted with constitutional questions faced in the United States, a title immediately indefeasible may be registered, under the registration laws in force in this country a certificate purporting to show an indefeasible title may be defeated, except after the running of a statute of limitations.

And it must be borne in mind that these conclusions are induced by considerations which are constitutional and hence not subject to legislative correction.

#### PRACTICABILITY OF ACTS.

The plan of dealing with land titles by certificate has received the enthusiastic indorsement of civic organizations wherever considered; the act was passed by the Legislature of the State of Illinois with only four opposing votes and in other States by large majorities. It

is difficult to lodge a valid objection to the fundamental idea from a viewpoint of practical business; in other countries the system has become popular and has been put into general use. In the United States, however, it can not be said that the law's progress in any State has been satisfactory; in no State has it been made use of except in a small way, though in a few counties in some of the States, where the provisions of the statutes appear to be supplemented by a painstaking supervision of the court, it has advanced to the point that certificates of title have become acceptable in the usual course of business involving real estate transactions.

Many reasons have been assigned for the lack of progress of the system. Those opposed to any system which will interfere with existing customs argue—

(1) That a certificate of title issued under a registration law can not safely be accepted until the United States Supreme Court passes upon the constitutionality of all provisions of the act.

(2) That the cost of original registration of title is prohibitive; that the cost exceeds the cost "of any single transfer under the present system, and as no man expects to sell the same piece of property more than once, naturally he will adopt the cheaper method."

(3) That the provisions for indemnity afford no protection because of insufficiency of the assurance fund.

On the other hand, advocates of the system cite—

(1) The rulings of many State courts of last resort in which the constitutionality of the acts in essentials has been upheld, and analogous decisions of the United States Supreme Court in which the main principle involved in the registration acts has been sustained.

(2) The State guaranty against loss is pointed out as being a protection superior to private title insurance.

(3) They point to the cost of repeated searches and examination of same titles under the prevailing custom, their delay and final lack of certainty as to title under that custom; they argue that yearly the records are becoming more voluminous and searches more expensive and that the prevailing custom is archaic and unsafe and neither efficient nor economic; that improvement upon the present system is a matter of public concern, and the matter of adoption of an improved system should not be determined by the cost of a single transaction under the prevailing system in comparison with the cost of a proceeding which determines the title once for all time and for all purposes.

Whatever the merits of the respective arguments may be the fact is that the progress made under the acts is not in keeping with what should be expected from a system which offers the possible benefits

and improved condition claimed for land title registration by certificate.

In searching for the cause of lack of general adoption many considerations appear to support the conclusion that the true causes are to be found in the time required for a registered title to become conclusive (so called) and available, the initial expense of proceedings, and doubt as to the validity of material provisions of the statutes. To these should be added the human dislike to move until some immediate objective or necessity arises. Every owner considers the condition of his title good enough until he wishes to use it or until it is attacked, and then it is too late to begin registration proceedings, ordinarily.

Also, it must be borne in mind that the general adoption of the system is dependent upon the good will of the legal profession. This is true because all registration begins with a court proceeding. Owners will not voluntarily petition for registration against the advice of their attorneys and no thoughtful attorney will advise proceedings under the registration laws if doubtful of their validity.

#### TIME REQUIRED IN PROCEEDINGS.

In Illinois<sup>1</sup> and Oregon a conclusive decree can not be obtained in less time than 2 years; in other States the time required to obtain a so-called conclusive decree varies from 30 days to 2 years. It will readily be seen that an owner would ordinarily be deterred from registering his title in expectation of using his certificate upon a pending sale or mortgage in the States in which the conclusiveness of registration is so long deferred. The cause for the long period of time provided in many statutes between commencing the proceeding and conclusiveness of the decree is the plan to overcome certain constitutional objections, heretofore adverted to, through creating in the proceeding a statute of limitations. This is done by providing that the proceeding may be reopened within a stated time after judgment but not thereafter. The time in Minnesota was 60 days, and of it the supreme court of the State said that "it seemed very short," yet the provision was held sufficient as a statute of limitations to bar a claimant who is entitled to actual notice but who has not been personally served in a case wherein the court has acquired jurisdiction.<sup>2</sup> The corresponding time in Illinois is 2 years, in California 1 year, and in other States it is intermediate periods. The Massachusetts provision is 30 days, the shortness of which caused the supreme court of that State to split in the leading case of *Tyler v.*

<sup>1</sup> The periods of time herein mentioned do not entirely follow the table hereinbefore given because the wording of the provision of certain statutes is insufficient as a statute of limitations; at the same time the statutes do not pretend to produce a conclusive certificate within a shorter time than is herein mentioned.

<sup>2</sup> The time has since been enlarged to 6 months.

Judges. The time between commencement of a proceeding and finality of a decree should be as short as it can safely be made in order that the demands of business may be accommodated, if the theory of a conclusive certificate is to be carried out.

In the accompanying brief authorities are cited in which are discussed statutes which are intended to bar the right to commence an action over subject matter about which a decree has been entered but without jurisdiction. The latter class of statutes appear to be analogous to statutes by which title may be acquired by adverse possession and would have to be reasonably long, two years, possibly one year, in view of the nature of the proceedings.

### COST OF PROCEEDINGS.

From the comparative study of laws submitted herewith it will be seen that the requirements and costs of a proceeding for initial registration are burdensome in all States, very burdensome in many.

The master of titles for the Province of Ontario has stated that the initial expense acts as a deterrent to many who would be glad to have the advantage of holding their property under the system. He states also that the initial expense on a property valued at \$1,000 is \$6, and that on a property valued at \$10,000 it is \$20—under the Ontario law of land-title registration the two items of expense being cost of publication of notices and contribution to assurance fund. There is no initial court proceeding.

The following items of expense must be met under the statutes in the United States; they vary slightly, of course, with the customs and laws of different States in amounts, but on an application involving a \$5,000 valuation they may conservatively be stated to be:

|                                                |        |     |
|------------------------------------------------|--------|-----|
| 1. Filing application.....                     | \$1 to | \$6 |
| 2. Publication and notices.....                | 2 to   | 15  |
| 3. Abstract.....                               | 5 to   | 50  |
| 4. Examination of abstract.....                | 5 to   | 30  |
| 5. Attorney's fee.....                         | 25 to  | 50  |
| 6. Final registration fees.....                | 2 to   | 4   |
| 7. One-tenth of 1 per cent insurance fund..... | 5 to   | 5   |
| Total.....                                     | 45 to  | 160 |

The costs of an actual proceeding in Massachusetts on a property, assessed at \$124,550 were \$303.35, exclusive of cost of abstract and attorney's fee. The cost of a proceeding under the Massachusetts act is not higher than in other States except, perhaps, in California, where the cost may be reduced by reason of a provision which permits any number of applicants to join in one application though owning land in severalty and where also an abstract may be dispensed with, if the applicant alleges and proves title by adverse possession.

While the cost of a proceeding to register the title may not be disproportionate to the benefits, it is sufficiently high, it seems, to discourage voluntary resort to the law in the ordinary case. This view is strengthened by the fact that in countries where a title can be registered without a preliminary judicial proceeding and the incident cost and delay, the system has progressed rapidly, in comparison with its progress in the United States.

### LEGAL OBJECTIONS.

The most serious cause of lack of adoption of the system, it seems, is the difficulty of legally accomplishing its purposes along the lines laid down in the acts. Such difficulties are further discussed in the accompanying brief and study of all acts.

The conclusion is there reached that no certificate of title under land-title registration acts in the United States can be, immediately upon issuance, conclusive of the state of title. As evidence of title immediately available upon entry such a certificate is at best an opinion of the title by the registrar, acting in some States under the direction of court.

The fact that entries are made "under direction of the court" relieves the statutes of the objection that the duties of registrars are judicial, but it is not clear how such a requirement can add to the conclusiveness of entries unless such direction be given in the form of an order of court which results from a judicial hearing. Such a hearing is not required in all transactions by any registration statute.

The courts have declared, as appears in the accompanying brief, that the entries of registrars are not conclusive, and all fundamental law appears to be against their being conclusive, yet the statutes attempt to give them conclusive effect by providing for certificates of title being available and conclusive of the state of title immediately upon the making of such entries subsequent to original registration and under some statutes immediately upon original registration. The result is an inability on the part of the legal profession as a class to accept the provisions as sound or to advise the bringing of land under the system.

If the foregoing be the causes contributing to the failure of general adoption of the laws already in force in the States, it seems proper to consider whether they may be removed or to what extent their effect may be lessened, if it be, as stated in Senate Document No. 380, page 18, that—

Every student of the subject must conclude that the States should adopt some system of State guaranty of title, as, for instance, the Torrens system.

## SUGGESTION FOR REDUCTION OF COST OF INITIAL PROCEEDINGS.

The principal items of expense are filing fee, cost of publication of notice, cost of abstract, cost of examination of abstract by official examiner, and attorney's fee.

Already the California act permits as many applicants as may wish to join in one petition. That provision makes possible a minimum of cost for publication of notice and filing fee.

As is elsewhere pointed out, all acts provide for one or more official examiners of titles in each county, to be appointed by the court (or in some States by the registrar). If the putting into effect of a title registration law may be regarded as a matter of public welfare, the title examiners of a county, who are already public officials, might be charged with the duty of initiating all registration proceedings and conducting all such except contested cases.

Moreover, the whole plan is one of title insurance by the State; if the State is to be liable for errors in proceedings, it seems that a public official should conduct the proceedings. In addition to saving to individual applicants the necessity of employing each his own attorney,<sup>1</sup> applicants could be grouped and joined in proceedings under one direction and in such numbers and manner as might be most conveniently and expeditiously done.<sup>2</sup>

Furthermore, in many localities early records do not exist, in some the records have been destroyed by fire and in others they are incomplete and the missing links can not be supplied. Under such conditions the furnishing of an abstract showing a record title is impossible, of course. In some such States, notably Illinois and California, laws have been passed which permit an owner of land to establish and quiet his title upon filing a verified pleading similar in substance to the petition required by title registration acts; under such laws<sup>3</sup> abstracts of title are not required, but notice is required to be given of such proceedings, similar to the notice required by the acts here under consideration; the procedure is upon the theory that the facts set forth in the petition, wherein ownership is claimed by the applicant, are true, if no one, after notice, appears to contest the applicant's claim.

The primary purpose of requiring an abstract of title is not, it seems, to ascertain whether the applicant owns the land sought to be registered, but whether there be others than those named by the

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<sup>1</sup> Upon inquiry at the registrar's office in Cook County, Ill., it has been ascertained that the registrar does, ex industria, the things suggested in this paragraph.

<sup>2</sup> It was argued in the early stages of title-registration law in this country that lawyers would oppose the system upon the ground of self-interest. It does not appear that they, as a profession, have done so.

<sup>3</sup> The most recent of such laws, the California act, was upheld by the United States Supreme Court in 1910 and is elaborated upon in the attached brief.

applicant who are entitled to notice. If the applicant be in possession, even though the title be defective, he is entitled to have the title quieted and the defects cured by the proceeding, since possession is *prima facie* evidence of ownership and sufficient in law to support a finding of ownership by a competent tribunal, if not contested after legal notice;<sup>1</sup> moreover, should there be other parties interested as discovered by an examination of an abstract, such parties, at most, become only entitled to notice; the chief benefit in a registration proceeding to follow from an examination of abstract of title is, therefore, notice to a possible claimant not named by the applicant.

Many acts require the registrar to keep "property indices" or "tract indexes" upon which are shown the section (or subdivision), the range (or block), the township (or lot), and any further description necessary to identify each piece of land, also the name of the owner.

Name indices of owners, also, are required to be kept in alphabetical order, with columns for notation of liens, claims, charges, etc., and the name of the holder of such.

Should the acts require all owners to file with the registrar within a stated period after passage of act, or amendment, a brief summary of claim of ownership<sup>2</sup> and require all adverse claimants and encumbrancers to file a brief statement of their claims, all to be entered in indices such as are above mentioned, and permit the person claiming ownership to begin a proceeding for registration of his title upon expiration of a stated number of months after filing of the summary, it seems there would be little likelihood of any person other than a bona fide owner commencing a proceeding to register or that any person interested would go without notice, for on a single page of the property index would appear the name of the person claiming ownership and the names of all adverse claimants who have complied with the statute by filing their notice of claim, each of whom would receive actual notice of proceedings to register.

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<sup>1</sup> Possession of land by a party, claiming it is his own in fee, is *prima facie* evidence of his ownership and seisin of the inheritance. (*Ricard v. Williams*, 7 Wheat., 59; 5 L. Ed., 398; *Boon v. Chiles*, 10 Pet., 176, 220; 9 L. Ed., 383.) Generally speaking, the presumption is that the person in possession is the owner in fee. If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of title. (*Bradshaw v. Ashley*, 180 U. S., 59, 65; 45 L. Ed., 423. 7 *Encyc. U. S. Sup. Ct. Rep.*, 970.)

<sup>2</sup> The well-being of every community requires that the title to real estate therein shall be secured, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the General Government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. (*American Land Co. v. Zeiss*, 55 L. Ed., 95.)

The act would provide that the summary should be admissible in evidence, having the effect of creating a rebuttable presumption of existence of title as stated therein. Under such a plan it seems an abstract of title would become unnecessary in uncontested cases. With the personal service and notice required by publication under all statutes it seems improbable that a proceeding by a person in the peaceable possession of land would result in unjustly depriving anyone of a right in the land.

If the provisions covering the foregoing matters should be adopted, more than nine-tenths of the cost of initial registration would be obviated. The resultant costs would be approximately:

|                                                                         |                  |
|-------------------------------------------------------------------------|------------------|
| Filing fee (a fractional part of from \$3 to \$6)-----                  | \$0.10 to \$0.60 |
| Publication cost (a fractional part of from \$2.50 to \$15)-----        | .20 to 1.50      |
| Cost of abstract of title-----                                          | .00 to .00       |
| Cost of examination of abstract-----                                    | .00 to .00       |
| Final registration fee-----                                             | 2.00 to 4.00     |
| One-twentieth of 1 per cent for insurance fund (\$5,000 valuation)----- | 2.50 to 2.50     |
| Total-----                                                              | 4.85 to 8.60     |

The expense of employment of an attorney would be obviated, except in contested cases, since the proceeding would be conducted by a public official.

Compensation of official examiners of title under existing acts is fixed by the court in a majority of the States, and, it may be assumed, the volume of business is an element considered in fixing the amount of compensation; under the foregoing plan the system would have an authorized agent in each county whose duty it could be made to acquaint the public with the merits of the system, and who would have every inducement to awaken an interest in it with the backing of public authority.

Such a plan would possess a further advantage in that opportunity for fraud where all proceedings are instituted by a public official would be minimized.

#### SUGGESTION FOR MEETING LEGAL OBJECTIONS.

While it seems that the foregoing plan might overcome the objection made to the system on account of expense of initial proceedings, it does not provide against the objection raised on account of length of time required to obtain a usable certificate or against the objection raised on account of doubtful validity of certain provisions of the statutes wherein regularity in judicial proceedings is assumed and entries made by registrars are deemed conclusive. It appears from the authorities cited in the accompanying brief that it is most doubtful whether the time required from filing of petition for registration to obtaining a conclusive decree can be made shorter than the time

provided in the longer statutes shown in the table hereinbefore given. In order that a certificate of title issued under the registration plan may be deemed conclusive, it seems necessary that statutes of limitations be provided, and that as long a period as practicable, two years, certainly one year, must elapse after date of the certificate.

If the foregoing conclusions are sound, it seems improbable that the land title registration plan can be successful in operation wholly upon the theory upon which the statutes are drawn and the system operated. The demands of business are for certificates immediately available upon entry. Condemnation of the system, however, does not necessarily follow.

No existing custom, whether of legal opinion based upon examination of abstract (in which error of opinion as well as error in abstract may exist) or of title insurance, offers a title of which conclusiveness can be predicated with even the certainty of a registration certificate. Under the custom of accepting legal opinions, based upon abstracts, the responsibility of the attorney rendering the opinion and of the party making the abstract affords the only protection against error; under policies of title insurance, the policy is written upon a legal opinion only and not upon an adjudication of title as in registration. Under registration the certificate can be made conclusive by lapse of a reasonable time.

From time of original registration to the issuance of a certificate to a purchaser or encumbrancer judicial proceedings affecting the title may intervene, yet only such proceedings need be examined under the registration plan as are noted upon the registered certificate, for none other can affect the title. And, moreover, only such proceedings or other transactions as are shown by the notation on the certificate to have taken place within the period of the statute of limitations need be examined, for rights under all others become automatically barred by the running of the statute.

The cost of examination into such matters would be nominal and the time required for report thereon would be brief because all records affecting the title could be located within a few minutes through the indices provided, hereinabove mentioned. Under such a provision certificates of title would represent the maximum of practical safeguards during the running of the statutes of limitations and thereafter be absolutely conclusive; the longest period of time necessary to examine into, for any purpose, would be the period of the statute of limitations provided. They would possess all the merits which any certificate of title or policy of title insurance issued under the prevailing custom possesses, together with every advantage offered by the plan adopted in the registration statutes. Especially under the foregoing plan does it seem that certificates of title would possess every quality of certainty and protection known to exist in

any form of evidence of title, if the provision of the Massachusetts statute (see 98) should be adopted, and held valid, whereby any deficiency in the assurance fund must be made good, in event of loss, out of unappropriated funds in the State treasury, or after the assurance fund will have accumulated to an amount adequate for protection.

Opponents of the registration system have directed their attacks to the validity of registration proceedings, both original and subsequent; proponents of the system have urged its adoption because of the economic waste in time and money in the prevailing custom of repeated examinations of the same title, lack of certainty of results of such examination, and the consequent burden cast upon real estate assets. In other words, the objections urged against the system are legal and the arguments made in favor of it are directed to practical considerations.

It seems most important, therefore, that a system possessing the many advantages of land title registration should be based upon a statute, the validity of whose essential provisions has been approved by the Supreme Court of the United States, rather than that it contain any essential provision which can be the subject of serious doubt. Consequently the suggestions here made are given upon the theory that the statutes should follow along the lines and processes already approved by the United States Supreme Court in all matters involving a constitutional question. Such a conclusion has been reached because of the uncertainty of any other course and the importance of the subject matter involved. By following this course the benefits of the registration system, as claimed by its extreme advocates, will be lessened in a small measure, yet the general result, it is apprehended, will be more advantageous. It is difficult for a law to make progress about the validity of whose provisions a reasonable doubt exists. Such is illustrated by the following record of registration statutes:

| State.              | Year passed. | Amount paid into assurance fund to December, 1917. |
|---------------------|--------------|----------------------------------------------------|
| California.....     | 1897         | \$6,154.49                                         |
| Massachusetts.....  | 1898         | 73,190.05                                          |
| Virginia.....       | Feb., 1916   | 14.91                                              |
| South Carolina..... | 1916         | 1.10                                               |
| North Carolina..... | 1913         | 49.41                                              |
| Ohio.....           | 1913         | 4,152.62                                           |

By providing for the becoming conclusive of registrations, only upon the running of a short statute of limitations after entry, in accord with the views of the United States Supreme Court, already

expressed, criticism of the system because of legal objections will be removed and at the same time the economic advantages striven for will not be sacrificed to any appreciable extent.

In order that the suggestions contained herein may be presented in a form readily accessible, they will be consecutively stated as essential provisions of a statute designed to overcome the assigned causes of lack of progress of registration laws in the United States. Other general details of a statute which are clearly within the State legislative power to devise may be gathered from the accompanying "study" and need not be repeated herein, since no constitutional objection can be raised as to them. Obviously, too, such details should be provided with a view to local laws in the several States.

The following provisions are suggested without disparagement to but with the fullest appreciation of the many excellent features of the several registration statutes herein considered.

**SUGGESTED ESSENTIAL PROVISIONS OF A VALID STATUTE,  
UNDER WHICH REGISTRATION OF TITLE CAN SAFELY BE  
MADE AT A REASONABLE COST.**

(1) Primarily, the statute should provide for such procedure in the initial proceeding for registration as the United States Supreme Court has approved. In *American Land Co. v. Zeiss* (219 U. S., 47; 55 Law. Ed., 95 (1910)) a precedent is found.

(2) A statute of limitations, such as is discussed in *Saranac Land & Timber Co. v. Roberts* (177 U. S., 318; 44 Law. Ed., 792) and in *American Land Co. v. Ziess*, *supra*, should be provided in order that the original decree of registration shall be made absolutely conclusive. From the former case it appears that there is no doubt as to the propriety or force of such a statute, and from the latter case it appears that one year is a reasonable period of time for such when the fullness of the notice provided by the statute is taken into consideration.

(3) A statute of limitations, directed to entries made after original registration, such as is discussed in *Turner v. New York* (168 U. S., 90; 42 Law. Ed., 392) and in *Saranac Land & Timber Co. v. Roberts*, *supra*, should be provided, in order that the registration of subsequent transactions, affecting the title, shall be made conclusive.

In the former case it is held that it is within the constitutional power of the legislature of the State to enact such a statute and that a limitation of two years is not unreasonable. Such a statute, it seems, should be longer than that applied to initial proceedings for the reason that it operates independent of other notice.

(4) Every transaction, voluntary or involuntary or arising by operation of law, affecting a registered title or the right to possession of registered land, which, if recorded, filed, or entered in any

office in the county within which the land is situated, would affect the title or right of possession to unregistered land, should, if filed in the office of the registrar of said county, but not otherwise, be notice to all persons from the time of such filing.

(5) Registrars should be required to enter the decree of original registration and a notation or memorial of all subsequent transactions upon a single page of the register of titles, to become and to be known as the original certificate of title, and to issue duplicate certificates of title as provided by existing land title registration statutes.

(6) It should be provided that, upon the running of the statutes of limitations provided, the original certificate of title shall be absolutely conclusive of the state of title, saving and excepting only, first, liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of the State can not require to be filed in the office of the registrar; second, taxes and levies, assessed, but not delinquent.

(7) "It is to be observed that the statute not only requires a disclosure of all known claimants, but, moreover, at the very outset, contains words of limitation that no one not in the actual and peaceable possession of property can maintain the action which it authorizes." Mr. Chief Justice White in *American Land Co. v. Zeiss*, *supra*.

It appears to be most desirable that a limitation, similar to that mentioned in the foregoing quotation should be provided for the reasons stated in the opinion quoted.

(8) It should be made the duty of the official "examiners of title," for the appointment of whom all registration statutes provide, to initiate and conduct for applicants proceedings for registration of title in all uncontested cases.

(9) Under the direction and by the consent of the official examiner of titles, applicants for registration, owning in severalty within the same county, should be permitted to join in the same petition (see pp. 32, 33 hereof).

(10) Registrars should be required to keep "property indices," for which many statutes already provide, upon which are shown the section (or subdivision), the range (or block), the township (or lot), and any further description necessary to identify each piece of land, also the name of the owner.

Name indices of owners, also, should be kept in alphabetical order, containing a description of property, with columns for notation of liens, claims, charges, etc., and the name of the holder.

(11) All owners should be required to file with the registrar within a stated time (six months) after approval of act or amendment a brief summary of claim of ownership, giving description of property and source of title; likewise all claimants to subordinate interests, adverse claimants and encumbrancers should be required

to file within the same time a brief statement of their claims, giving description of property and nature of the claim, all to be noted in indices such as are above mentioned.

(12) The statute should authorize the commencement of a proceeding for registration of the title upon expiration of a stated time (six months) after filing of the summary of ownership, and provide for the giving of actual notice of the proceeding to all persons who will have filed with the registrar notice of an interest in, claim or charge against the property sought to be registered.

(13) The summary of ownership should be made admissible in evidence upon the hearing for registration, having the effect of creating a rebuttable presumption of existence of title as stated therein; however, no judgment or decree of registration should be entered by default, but it should be required that in all cases the immediate source of title and actual possession be proved to the satisfaction of the court.

(14) Provision should be made for the creation of an insurance fund, in the manner provided by all statutes, for the protection of registered owners and encumbrancers against fraud or forgery. Since, however, possible loss will be limited to the two exceptions specified in paragraph (6) above, and fraud or forgery under general equitable principles, statistics fully indicate the sufficiency of a payment of one-twentieth of 1 per cent of the assessed land value instead of one-tenth of 1 per cent which has been fixed in existing statutes as proper under a system which seeks to insure against loss under a certificate which may be accepted as conclusive from date of entry.

## RESULTS.

(1) Without surrender of any substantial benefit of the ideal registration plan to an objectionable degree, the foregoing provisions meet all legal objections raised and heretofore made to land-title registration statutes by opponents of the system, and free such statutes of all doubt as to constitutional validity.

(2) By examination of title over a period of time never longer than two years and under a plan whereby the whole record to be examined appears upon a single page, certificates of title for all practical purposes become available immediately upon entry at a nominal expense; and all advantages claimed for "title registration," as set out at page 43 hereof, are preserved, subject alone to said short-period examination.

(3) The whole expense of registration of title, without the sacrifice of any apparent precautionary measure, but with additional safeguards against fraud, can be reduced from an average cost of from \$45 to \$160 on a \$5,000 property to from \$4.85 to \$8.60, varying according to fixed charges under local laws and cost of publication

of notice. On properties of larger values the only extra expense of registration will be the additional one-twentieth of 1 per cent contributed to the assurance fund.

(4) After original registration the time required in determination of the average title should seldom exceed a few hours and the cost should be correspondingly small, without the possibility of monopoly.

#### **THE ECONOMIC SAVING IN TIME AND MONEY UNDER SUCH A LAND TITLE REGISTRATION PLAN, ILLUSTRATED BY APPLICATION TO PENDING BUSINESS OF THE FEDERAL FARM LOAN SYSTEM.**

In the first annual report of the Federal Farm Loan Board it is stated that within the next year the 12 Federal Land Banks will make over 50,000 separate loans and that the cost of determination of title under existing custom will be not less than \$650,000.

Such an enormous outlay is due, of course, to the necessary making of abstracts and examination of such, covering very long periods of time, whether done by abstractors and attorneys or by title insurance agencies.

If the 50,000 separate titles were registered the cost of determination of title, conservatively stated, should not exceed \$2.50 each, or a total of \$125,000, whether done by attorneys or title insurance agencies. The net saving in money alone would be \$525,000 and the facility and expedition with which the 50,000 loans could be closed would add largely to the economic value of the registration. The foregoing estimates of cost under registration are based upon opinions of persons competent and experienced in such matters.

Moreover, under the registration plan as outlined hereinabove, the full expense of registration of 50,000 titles by initial proceedings, assuming the average land value to be \$4,000, should not exceed a total cost of \$312,500, or less than 50 per cent of the estimated cost under the prevailing custom of examination, while in future transactions affecting the land the expense of determination of title should be not more than one-fifth of what it would be if the title be not registered.

#### **AS APPLIED TO SALES OF REALTY THROUGHOUT THE UNITED STATES.**

The assessed valuation of real property (land and improvements) in the continental United States in 1917 is estimated at approximately \$120,000,000,000; the actual assessed valuation in 1912 was \$110,676,333,071.

Nine per cent of all real property changes ownership annually, or an aggregate, representing the total valuation, in a little more than

11 years. Upon sales it is estimated that cost of determination of title exceeds one-half of 1 per cent of the value of the property under the prevailing custom. Applying that cost to the annual volume of business it appears that the annual expenditure for determination of title in the United States, in cases of sales alone, exceeds \$54,000,000. A reliable estimate of annual mortgage loans has been unobtainable. Cost of determination of title for purpose of mortgage is less than for sales, yet the difference in cost is more than offset by the larger number of mortgages. Should the cost of determination of title for purposes of mortgages be equal to that for purposes of sales in the United States, the total annual expenditure for determination of title in the two classes of transactions is not less than \$108,000,000. Should the improved method of keeping the records of transactions affecting title to real property herein suggested in the form of a registration statute be adopted and used generally, the annual saving in determination of title in the United States should be not less than \$80,000,000, to say nothing of the greater certainty given to titles and the economic benefits accruing from the facility and expedition with which transactions in realty could be consummated.

### INSURANCE.

Two views of the insurance feature of the registration plan herein submitted appear to be open for consideration. They may be denominated as the conservative view and the liberal view.

By the former is meant that view which would impose upon a purchaser or encumbrancer the obligation to verify the regularity of initial registration proceedings and the effect of subsequent transactions and proceedings affecting the title until such time as any irregularity or mistake in the registration of the same will have been cured by the running of the statute of limitations, thereby leaving the principal function of the insurance feature to be to protect an innocent purchaser or encumbrancer against fraud or forgery.

By the latter view is meant that which would undertake to insure a purchaser or encumbrancer against loss suffered by reason of irregularity in initial or subsequent proceedings or error, mistake or omission on the part of registrars, as well as against fraud or forgery, as of the date of the certificate.

If the conservative view should be adopted, a small percentage of land valuation contributed to the creation of an insurance fund should suffice, even one-twentieth of 1 per cent. As to the validity of such an insurance feature there appears no reasonable doubt, in view of the reasoning of recent decisions of the United States Supreme Court, upholding analogous provisions of workmen's compensation laws, in *New York Central Railroad Co. v. White* (243

U. S., 188), *Mountain Timber Co. v. State of Washington* (243 U. S., 219), and in *Noble State Bank v. Haskell* (219 U. S., 110).

Should the liberal view be adopted, a higher percentage of land valuation should be contributed; but then even a purchaser or encumbrancer would be obliged to examine the records, as under the conservative view, on account of the express exceptions, specified in all statutes and against which no statute has ever proposed to insure. Also an examination would be required pending the accumulation of a fund adequate to protect, unless absolute insurance by the State be provided by statute, as is done in Massachusetts, North Carolina, South Carolina, and Mississippi.

Much doubt, however, has been cast upon the validity of absolute insurance by the State through the wide publicity given the following language of the Supreme Court of Ohio in *State v. Guilbert* (56 Ohio St., 575):

The functions of the State are governmental only. Its powers are embraced within the three familiar divisions of legislative, judicial, and executive. He who affirms the existence of the power in question must be able to find it embraced in one of these divisions. And since the insuring of titles does not essentially differ from any other insurance, nor indeed from any other business or occupation, he must find authority in whose exercise the State may become the competitor of the citizen in every vocation.

What view the United States Supreme Court would take of the question is matter of opinion only.

In *Mountain Timber Co. v. State of Washington*, supra, it is said:

In *Noble State Bank v. Haskell* (219 U. S., 104) this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the State an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the State. In *Hendrick v. Maryland* (235 U. S., 610, 622), and *Kane v. New Jersey* (242 U. S., 160, 169) we sustained laws, of a kind now familiar, imposing license fees upon motor vehicles, graduated according to horsepower, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. Many of the States have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog owners, without regard to whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the State courts against attacks based on constitutional grounds.

And in *Bradbury on Workmen's Compensation*, 3d edition, page 70, it is said:

The meaning of the term "State insurance" or "State insurance fund" as applied in the workmen's compensation acts of New York, Ohio, Oregon,

Washington, West Virginia, and other States is somewhat of a misnomer. In each instance it is a "State fund" by virtue of the fact that it is supervised by State officials instead of private individuals. The State in no case guarantees the compensation payments.

The language employed in *Mountain Timber Co. v. State of Washington*, supra, and by Bradbury is, of course, conclusive of nothing, but by inference, it brings into question the validity of absolute insurance by the State, to be paid by general taxation, as is provided by the four statutes mentioned above.

Following the purpose of having a registration statute contain such provisions only as are free from doubt as to their constitutional validity it appears desirable that the conservative view of the insurance feature be adopted and purchasers and encumbrancers accept responsibility for examination of records pending the running of the statute of limitations.

The economic advantages of registration of title, hereinabove pointed out, accrue independently of the insurance feature. As is said by the Supreme Court of Illinois with reference to the constitutional validity of the main provisions of the registration statute in that State, so with reference to the system's benefits, "The indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purposes without it." (*People v. Simon*, 176, 111, 177.)

The ideal, however, would seem to be an absolute guaranty by the State and, except for a wide doubt as to the constitutional validity of such a provision, it would be here recommended. At the same time custom and ordinary caution would dictate an examination of records until such time as certificates of title become conclusive, and in that event the only risks to be insured against are fraud and forgery. A fund created by contribution should quickly become sufficient for that purpose.

#### ADVANTAGES OF TITLE REGISTRATION.

Among the advantages claimed for the system of *registering the title itself*, upon consummation of each transaction, over the prevailing system of recording instruments for the purpose of giving notice and perpetuating evidence of title, are the following:

(1) It substitutes an official adjudication of titles for an unofficial examination and gives greater certainty.

(2) It provides for insurance against loss by a registered owner from any cause except fraud to which such owner has been a party.

(3) It avoids the necessity of repeated examination of the same title, thus cheapening the cost of transfer.

(4) It obviates necessity of going back of the registry, since, it is claimed, each certificate is conclusive, it being made possible thereby to effect loans and transfers with ease and expedition.

(5) It renders real estate assets more available, thereby causing them to become more useful and valuable.

(6) Its advantages are effected without sacrifice of any advantage which the prevailing system offers and with stability of title and the utmost security to encumbrancers.

(7) It provides against the time when the records of transactions affecting land titles under a continuance of the prevailing custom will have become so voluminous as to make the cost of determination of title prohibitive in real estate mortgages of small amounts.

(8) *It aims to correct a prevailing condition under which the public records affecting titles to lands are, without regulation, coming into private control for all practical purposes.*

#### SUMMARY.

(1) Land title registration acts, having been approved in the year set after the name of each State, are now laws in the 19 following-named States:

Illinois, 1897.  
California, 1897.  
Massachusetts, 1898.  
Minnesota, 1901.  
Oregon, 1901.  
Colorado, 1903.  
Washington, 1907.  
New York, 1908.  
North Carolina, 1913.  
Mississippi, 1913.

Ohio, 1913.  
Nebraska, 1915.  
Virginia, 1916.  
South Carolina, 1916.  
Georgia, 1917.  
Tennessee, 1917.  
North Dakota, 1917.  
South Dakota, 1917.  
Utah, 1917.

(2) All acts are framed upon a common theory and procedure, namely, (a) determination of title by suit to quiet the title against "the whole world," (b) registration of the decree and issuance of a certificate purporting to show the full status of an indefeasible title at all times.

(3) The law has not been put into general operation in any State, notwithstanding it has been in force for 20 years in some States.

(4) The time required to obtain an indefeasible (so-called) certificate of title, the cost of an initial proceeding for registration, and lack of confidence in the validity of its provisions apparently are the chief deterrent factors to general adoption of the system.

(5) Proposition (a) in (2) above is sound in law and the necessary procedure can be adopted without conflicting with any constitutional provision, State or Federal; proposition (b) above is impossible of accomplishment in the absolute, but with the aid of statutes of limitations, for the creation of which certain acts provide, the period of time during which a registered title is not indefeasible can be shortened so as to render an examination of records unnecessary over a time longer than from one to two years.

(6) Of the acts in the 19 States above mentioned, proceedings in conformity to the provisions of each result in a decree which establishes a title that may be registered and which becomes conclusive upon expiration of time within which an appeal may be taken.

(7) No certificate issued under any existing title registration law in the United States can be accepted immediately upon entry of original decree as conclusive of an indefeasible title, but only upon the running of a statute of limitations after entry, already provided in many statutes as shown in the table hereinbefore given; the decree of initial registration, however, by which the title has been confirmed, affords an advantageous starting point for examination of title in all cases where such proceedings have been conducted in conformity to the statute.

(8) Certificates of title issued under the statutes, when based upon transfers subsequent to initial registration, may safely be accepted, provided the original proceedings were conducted as provided by the statute, that the records affecting the title since the decree of registration show nothing in conflict with the certificate and that all intervening judicial proceedings are regular, but not otherwise, except as the entry of original registration and of subsequent transfers become conclusive by the running of a statute of limitations which only the States of Ohio, Virginia, and Georgia attempt to provide (p. 27 hereof).

(9) An examination of all records required to be examined in order to determine the sufficiency of certificates of title, issued under the provisions of the statutes, as suggested in the foregoing paragraphs (7) and (8), should be possible without great loss of time or heavy expense, since no examination need extend back of the original decree of registration.

(10) All specific exceptions to certificates of title issued under the several statutes are set out in detail in the concluding subdivision of the accompanying study, pages 57-83, from which it appears that all certificates of title issued are subject to from three to six expressed exceptions and to from two to four exceptions arising by judicial construction in the State involved or by necessary implication.

(11) By incorporating proper statutes of limitations in the registration statutes (existing and new) and the making of examination of matters expressly excepted by law from all certificates and such filings as affect the registered title, pending the running of such statutes of limitations, it seems that all legal objections to the system can be removed, and the time and cost of determination of title reduced to a small fraction of prevailing requirements, the time required in the ordinary case being reduced to a few minutes, or an hour, as against days or weeks, as now, and the cost, of course, being proportionately lessened.

## COMPARATIVE STUDY OF LAND TITLE REGISTRATION STATUTES.

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A judicial proceeding which ends in a decree quieting the title against all persons is the initial step in all land-title registration statutes in the United States. The plan is that the decree shall serve as a new starting point in determining the title; that it shall declare absolutely the only rights which exist in the land and be conclusive against "the whole world."

The scheme further contemplates that, the title having thus been conclusively adjudicated, the substance of the decree shall be entered in a "register of titles," containing a description of the property affected, and that no subsequent transaction shall affect the title unless the writing evidencing such be filed with the registrar and a memorandum thereof be entered in the register of titles, along with the decree; that the record of such entries shall be known as a certificate of title and shall be conclusive evidence of the title. A single page, therefore, is presumed to show conclusively the actual state of the title at all times.

All land title registration statutes in the United States have been drawn upon this common theory, yet in the acts of the several States no uniformity in expression or arrangement exists. Such differences as there are, however, are little more material than are the differences in wording of deeds of conveyance in general use in the same States—all, with a few exceptions, being matters of form rather than substance. As the purpose and effect of all such deeds are to divest the grantor of title and vest it in the grantee, irrespective of the form of instrument of conveyance, so all land title registration statutes attempt to accomplish their purpose along the lines of one general plan, but not wholly in all States after the same model.

The comparative merit of the acts passed in the several States will probably be revealed by a study of all with particular reference to the following matters:

First, legal procedure.

Second, essential provisions, but as to which the statutes vary.

Third, provisions which draw in question the conclusiveness of certificates of title, issued under the several statutes.

Fourth, miscellaneous provisions, other than procedural, which are common to all statutes.

### LEGAL PROCEDURE.

A general plan of legal procedure is common to all land title registration statutes in the United States. It is based upon a proceeding (or suit) to quiet title, which is a statutory enlargement of one of the most simple and ancient of legal remedies, the suit *quia timet*.

The statutory right to maintain such a proceeding existed in many jurisdictions in the United States prior to adoption of a land title registration system in any State.

### WHO MAY PETITION FOR REGISTRATION.

All acts permit any party in possession to apply for registration of the title to land who is the owner, or has the power of appointing or disposing in fee simple of the legal estate.

### CONTENTS OF PETITION.

The proceeding is to be instituted by filing with the clerk of the court, having jurisdiction of the matter, a verified petition or complaint, which shall contain a full description of the land, the estate or interest of the applicant therein, and state when, how, and from whom it was acquired and whether occupied and by whom; also full facts as to the legal and marital status of the applicant; it shall also set out all known liens, interests and claims of every character against the land, and the names and addresses of all persons known to have or to claim any right, interest, or title to any part of the land, including adjoining owners, if the boundaries are to be fixed by the decree.

### JURISDICTION.

The courts of general original jurisdiction over civil actions of similar character in the States are given jurisdiction over land title registration proceedings by all title registration acts, except in Massachusetts, in which State a special court has been established, with exclusive original jurisdiction over such proceedings, known as the land court.

### LIS PENDENS—CONSTRUCTIVE NOTICE.

Constructive notice of commencement of proceedings is required to be given by filing with the register of deeds (recorder), who in the acts is designated registrar, a certified copy of the petition at the time of filing with the clerk the original. It is provided that this

filing shall have the effect of *lis pendens*, and that all subsequent dealings with the land shall be subject to the provisions of the act.

#### PETITION REFERRED TO "TITLE EXAMINER."

Whenever a proceeding is commenced the court may enter an order referring the application "to an examiner of titles,"<sup>1</sup> who shall proceed to examine into the title and into the truth of the matters set forth in the application; he shall search the records and investigate all the facts brought to his notice and file in the case a report thereon.

#### SUMMONS, FORM AND SERVICE.

If, in the opinion of the examiner, the case is a proper one for registration, or if the applicant elects to proceed to a hearing in court, though the opinion of the examiner be unfavorable, the clerk, under order of court, shall issue a summons (or citation) in appropriate form, wherein the applicant shall be known as plaintiff and all claimants named in the petition or in the report of the title examiner and all other persons (designated in the summons as "all whom it may concern" or "all persons claiming any interest in or lien upon the real property herein described or any part thereof") shall be known as defendants.

The summons (or citation) shall be directed to the defendants and shall require them to appear and answer as in other civil actions; it shall be served upon known resident defendants as in other civil actions and upon all nonresident defendants and upon "all whom it may concern" or "all persons claiming an interest in or lien upon the real property herein described or any part thereof," by publication in a local newspaper of general circulation once in each week for a stated time, varying from three to eight weeks. Further notice is required to be given to nonresident defendants whose place of residence is known, by the clerk sending, by mail to such, a printed copy of the summons.

#### ANSWER.

Any person claiming any right, title, estate, or interest in or lien upon the land, whether named in the summons or not, may file an answer. "If no person appears and answers, the court may, upon motion of the applicant and upon satisfactory proof of the applicant's right thereto, make its decree *confirming the title* of the applicant and *ordering the registration thereof*."

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<sup>1</sup> All acts provide that one or more examiners of title may (or shall) be appointed in each county, to be paid by the county, or the applicant, such compensation as the judge presiding may determine, or as is otherwise provided.

## GUARDIAN AD LITEM.

The court may appoint a disinterested person to act as guardian ad litem for minors and other persons under disability and for all other persons not in being who may appear to have an interest in the land.

## TRIAL.

When an answer is filed, and the time for appearing has expired, the case shall be tried in like manner as any other suit in equity; but the court may refer the cause to one of the examiners of title, as referee, to hear the parties and their evidence and make report thereon to the court, with the effect of the report of a master in chancery.

## DECREE.

If the court finds for the applicant, a decree of confirmation and registration of title shall be entered. Final decrees shall quiet the title and be binding and conclusive upon all persons; most statutes<sup>1</sup> provide that such decrees shall become final by the lapse of a stated interval after date of entry (varying from 30 days to 2 years) and that they shall not thereafter be opened by reason of the absence, infancy, or other disability of any person. The decree shall show all rights in the property described in it and their priority and shall contain all matters proper to be determined by the court in order to settle and define fully the status of the title. Immediately upon the filing of the decree the clerk is required to file a certified copy thereof in the office of the registrar; a record of the title shall thereupon, pursuant to the terms of the decree, be entered in a book, called "register of titles," required to be kept for the purpose. *The entering of the status of the title in the register of titles constitutes the act of original registration, and the page upon which the entry is made becomes the original "certificate of title."*<sup>2</sup>

## APPEALS.

The acts provide for the taking of an appeal upon like notice and like conditions as are provided for the taking of appeals in other civil actions, tried in the same court; the time, however, within which an appeal may be taken is not in all acts made to conform to that applicable to other civil actions. Most statutes contain, in addition to

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<sup>1</sup> Details are given later herein.

<sup>2</sup> It is required that all certificates of title be issued in duplicate, the original to be retained in the registrar's office in the register of titles and a duplicate or duplicates to be delivered to the owner or owners.

the right of appeal, a provision similar to section 27 of the Minnesota act which is as follows:

No decree of registration hereafter entered, and no original certificate of title hereafter issued pursuant thereto, shall be adjudged invalid or set aside, unless the action in which the validity of such decree, or of the original certificate of title issued pursuant thereto, is called in question, be commenced, or the defense alleging the invalidity thereof be interposed, within six (6) months from the date of such decree.

The time specified in the foregoing provision varies in the several acts from 30 days (Massachusetts) to 2 years (Illinois).

## TRANSACTIONS SUBSEQUENT TO ORIGINAL REGISTRATION.

### VOLUNTARY TRANSACTIONS.

In voluntary transactions<sup>1</sup> the instrument or writing evidencing the transaction must be filed with the registrar, who, upon presentation of the owner's duplicate certificate of title, is authorized to register the transaction; and no transaction can affect the title until registered.

### INVOLUNTARY TRANSACTIONS.

In involuntary transactions a certificate from the proper State, county, city or court officer, or certified copy of the order, decree<sup>2</sup> or judgment of any court of competent jurisdiction, or satisfactory evidence of compliance with the statute in relation to such transaction, when filed in the office of the proper registrar, shall be authority for him to register the transaction.

## PROVISIONS AS TO WHICH STATUTES VARY.

The foregoing outline gives the substance of all acts<sup>3</sup> and the course of procedure generally accepted as being sufficient, but it is not to be understood that the procedure is uniform in all States; on the contrary it can not be said that the procedure in any one of the

<sup>1</sup> The definitions of voluntary and involuntary transactions used in the Virginia act will be followed herein. They are:

The words "voluntary transaction" mean all devices and all contractual or other acts or dealings, by any registered owner of any estate or interest in land with reference to such estate or interest, and to any statutory right or exemption claimed therein.

The words "involuntary transaction" mean the transmission of registered land or any interest therein by descent, the rights of curtesy and dower, all equitable rights and claims, judicial proceedings, or statutory liens or charges, the exercise of the right of eminent domain, the lien of delinquent taxes and levies, affecting registered lands, or any interest therein.

<sup>2</sup> Transfer of registered title passing through statutory, probate, and other judicial proceedings are excepted in many acts, later discussed.

<sup>3</sup> The assurance feature has been held to be no essential part of the substance of the law, but it will be considered later herein.

successive steps, from form in which the proceeding is instituted to final decree, is identical in all acts. The general plan, however, is present in all. It will be the purpose here to discuss only essential matters. Such differences as exist but are not discussed herein are considered due to local conditions, or as involving no question of important bearing upon the subject. Matters more or less substantial as to which the several acts differ are embraced in a consideration of the following questions:

(1) Should a proceeding to register title be maintainable by persons claiming to own the equitable estate as well as by those claiming to own the legal estate in land?

The Massachusetts act (sec. 18) provides:

Application for registration of title may be made by the following persons: First, the person or persons who claim, singly or collectively, to own *the legal estate* or easements or rights in land held and possessed in fee simple. If the holder of a mortgage does not consent to the making of the application, it may be entered nevertheless, and the title registered, subject to the mortgage, which may be dealt with or foreclosed as if the land subject to it had not been registered. The decree of registration in such cases shall describe the mortgage, and shall state that it has not been registered and that registration is made subject to it, and shall provide that no subsequent certificate shall be issued and no further papers registered relative to such land after a foreclosure of such mortgage.

New York limits the right of registration of title to owners of the legal estate. Illinois, California, and other States expressly or impliedly provide that the owner of the legal or equitable estate may maintain the proceeding, but the statutes contain a section in substance as follows:

No lesser estate than a fee simple and no mortgage, lien, or other charge upon land, shall be registered, unless the estate in fee simple therein is registered; but the fact that the estate or interest of the applicant is subject to any outstanding lesser estate or to a mortgage, or other charge or lien, shall not prevent its registration.

So long as registration is optional the better plan would seem to be to limit in general the right to owners of the legal estate (or to persons having an estate of inheritance or for life in land), but qualified by a section similar to that last quoted above (from the Minnesota act) and at the same time exempt the title, as is done in Massachusetts, from effect of registration in event of foreclosure (or termination of estate) if mortgagee or lienor (or remainderman) does not consent to registration. In coming to such conclusion a belief that the party in immediate control of land owning the fee simple is entitled to decide whether the title shall be registered has controlled. At the same time a mortgagee, at the time of registration, is entitled to be free from registration in event of foreclosure should he so elect.

(2) Should persons out of possession but claiming to be owners of land in fee simple be permitted to apply to register title?

The Massachusetts act limits the right to owners *in possession*; the New York act likewise, by a general provision, limits the right to those in possession, but by a special provision extends the right to those holding a contract for purchase of the legal estate in fee simple, which is done, it seems, merely to permit of registration pending sale. The Minnesota act confers the right upon *all owners* of land in fee simple, and in that State the supreme court has held that *a party out of possession may bring suit for registration of title against a party in possession*; the State supreme court has also held that the curative provisions of the statute do not apply to persons in possession; hence as to such who may not be served a decree of registration does not become conclusive, but such cases form one of the exceptions to conclusiveness of certificates of title. The acts in all other Western States are of the same import as the Minnesota act and, in such States, particularly in such as have a statute permitting persons out of possession to maintain suits to quiet title, the Minnesota precedent would doubtless be followed under test.

The common-law suit to quiet title can not be maintained by a party out of possession. Since the proceeding may not be maintained by a person out of possession against persons in possession, except by statutory authorization, it becomes necessary to determine whether the right should be extended to persons out of possession and requisite that appropriate expression by statute be given to the view which is to control.

A proceeding to quiet title by a person out of possession against a party in possession usually invites a contest. It is the object of registration laws to register titles as readily and as inexpensively as possible and to deal with titles of a present accepted status; to have the law create unnecessarily a tribunal for protracted contests would tend to impair its efficiency.

Other laws amply provide for determination of contests over possession. The system is purely an administrative system in other countries, designed to simplify land transfers, and was not devised to set up a court of contest; neither has the system been adopted by any State in this country for that purpose. Consequently it seems that only persons in the peaceable possession of land should be permitted to maintain a proceeding for registration.

But in any event no good reason appears why vacant and unoccupied land should not be subjected to registration of title.

(3) Should the application be made in the form of petition or complaint?

Other proceedings to quiet title employ the form of a complaint. This is a question of slight importance, however, and arises only

because in New York the proceeding is initiated by a complaint, whereas in all other States a petition is required, as is done in the original and other Torrens laws in Australia and throughout British dependencies. Under foreign laws the petition does not become a matter of court proceeding but is presented to the registrar who has power, as an administrative officer, to register titles. The first Illinois act followed the Torrens acts in that particular and did not provide for an initial court proceeding; on that account the law was held to be unconstitutional. In the new act in Illinois it was provided that the proceeding shall be a matter to be heard in court, but the form of petition was retained. The reason for the use of the petition does not exist in this country, but it is equally as serviceable as a complaint. Owners of land are more accustomed to the formal complaint, yet they are more reluctant to file a complaint than a petition, even though the purpose of both be the same. The petition appears to be the more appropriate to the nature of the proceeding, viz, the exercise of a right in rem, rather than a contest over the land.

(4) Should all applicants be required to file an abstract of title?

The Minnesota act requires the filing of "an abstract of title, satisfactory to the title examiners."

The Illinois act commits an examiner to an exercise of discretion as to the means to be employed by him in examining into "the title and truth of the matter set forth in the application"; he "may receive in evidence any abstract of title or certified copy, but the same shall not be held as more than *prima facie* evidence of title." Oregon followed the Illinois act.

The Washington, Colorado, Mississippi, North Carolina, South Carolina, and Georgia acts require the filing of an abstract. In New York a certificate of an official title examiner is required as a condition precedent to the filing of an application, but no abstract of title is required. The California act requires an abstract of title or policy of title insurance, unless the applicant alleges and proves title by adverse possession. In Massachusetts the petition is referred to an examiner of titles "who shall search the records and investigate all facts stated in the application or otherwise brought to his notice, and shall file in the case a report thereon, concluding with a certificate of his opinion upon the title."

In a suit to quiet title if possession be alleged and proved the fact becomes *prima facie* evidence of title, and, if not rebutted, is sufficient in law to sustain a finding of ownership in the plaintiff. One of the primary purposes of a statutory suit to quiet title is to make good a title which is defective of record.

Should an abstract of title not show record title in the applicant, if the suit be uncontested after notice as required by statute, and the

applicant be in possession, he is entitled to a decree curing all defects and quieting the title. It follows that the purpose of the requirement of an abstract is not primarily to ascertain whether the applicant has a good title.

From an examination of an abstract, however, it may be discovered that other persons than those mentioned by the applicant are entitled to actual notice of the proceeding; to have in hand a possible means of making such discovery seems to be the chief object of requiring an abstract of title. The question arises whether the requirement, with the incident cost of abstract and expense of examination, is warranted in all cases, contested and uncontested, or whether other means affording equal facilities for discovery, but less burdensome upon applicants, can not be provided with equal satisfaction, or better, and more economically. This question is discussed in the accompanying report under "Cost of initial proceedings."

(5) Is provision for trial by jury necessary?

The Massachusetts act requires that the cause be tried by jury upon motion of either party; likewise in New York, California, Georgia, Mississippi, Virginia, South Carolina, and North Carolina; the Supreme Court of Massachusetts has held that in such a proceeding the court has no right to refuse trial by jury (*Weeks v. Brooks*, 205 Mass., 458).

In Minnesota the act contains no provision for trial by jury and the State supreme court has held that there is no constitutional right to trial by jury in such a proceeding since it is a proceeding in equity of the nature of a suit to quiet title (*Peters v. Duluth*, 119 Minn., 96). Colorado, Illinois, Nebraska, Ohio, Oregon, and Washington follow Minnesota in this regard.

In the ancient bill *quia timet*, being purely a suit in equity, the plaintiff has no right to trial by jury, but neither had a person out of possession of land the right to maintain such a suit. When it is recalled that the Minnesota Supreme Court has held that a person out of possession may maintain a proceeding for registration of title (*Reed v. Sidall*, 94 Minn., 216), it becomes difficult to follow the court to its conclusion that denial of trial by jury does not impinge upon constitutional rights; many authorities, however, support the Minnesota view, even much dicta by the United States Supreme Court.

It seems that the safer course lies in the provision for trial by jury, made in the Massachusetts act and the acts of other States, especially since the law must satisfy both State and Federal Constitutions in this regard.

6. Is notice, served by mail only, sufficient?

The Massachusetts act provides that notice may be served by mail. The acts of all other States require service to be made in the manner provided to apply in suits of a similar character, that is, by messenger.

The Massachusetts Supreme Court has held that notice given by mail is sufficient (*Tyler v. Judges*, 175 Mass., 71). In the opinion Judge Holmes said:

It must be remembered that there is no constitutional requirement that the summons, even in a personal action, shall be served by an officer. If the statute is within the power of the legislature, it is not for us to criticise the wisdom or expediency of what the legislature has done.

No good reason appears for departure from the manner of service required in other civil actions, yet it is clearly within legislative power to provide such notice as it may deem proper so long as it be reasonable and just. (Authorities cited in brief.)

(7). Should posting upon the land be required?

The acts of Minnesota, California, Colorado, Illinois, and Washington do not require posting notice of the proceeding upon the land; the acts of other States make the requirement.

Again, this is a matter solely within the power of the legislature to determine, and omission to post notice is not repugnant to any constitutional provision so long as the notice given can be said to be just and reasonable.

"The criterion is not the possibility of conceivable injury, but the *just and reasonable* character of the requirements, having reference to the subject with which the statute deals" (*American Land Co. v. Zeiss*, 55 L. Ed., 97), yet in *Tyler v. Judges*, supra, Judge Holmes referred to such posting as being one of the supporting considerations of a constitutional notice which satisfied the due process requirement in such a proceeding. The statute under consideration in *American Land Co. v. Zeiss*, supra, required "posting"; the language quoted was applied to the general subject of notice in suits to quiet title against all persons, and not to the particular point here discussed.

A requirement of posting does not appear to be unreasonable in any case, and in such jurisdictions as permit parties out of possession to maintain the proceeding it would seem to be unjust not to make the requirement.

(8) The remaining question upon which the acts vary and which will be here discussed is one of policy only, viz, Should such statutes be made applicable by their terms to the whole State or should adoption be a matter of referendum to a vote by counties?

The Illinois act provides for a referendum. It has been said that the provision was inserted in order that Cook County might vote

upon the adoption of the system in order to relieve a local condition. In Cook County a monopoly of abstract and title business grew up, following the great Chicago fire. Cook County adopted the system by a very large majority. The referendum provision has been held to be constitutional (*People v. Simon*, 176 Ill., 165).

(9) Should it be provided that title once registered forever remain registered?

All statutes excepting those in Nebraska and Georgia provide that a title once registered shall forever remain registered. In the two States named land may be withdrawn from registration at any time by the owner. The requirement against withdrawal puts a restriction upon the title which, it seems, is not advantageous. It limits dealings, involving the title, to persons willing to accept the registration system, and whether the law becomes generally adopted in a State or becomes "a dead letter" the registered owner may not free the title from its operation. The provisions of the Nebraska and Georgia statutes appear to be more inviting to registration.

#### MISCELLANEOUS PROVISIONS COMMON TO ALL STATUTES.

(1) A nonresident applicant shall appoint a resident agent upon whom process and notice may be served.

(2) Any number of adjoining parcels of land in the same county and owned by the same person and in the same right, or any number of parcels in the same county having the same chain of title and belonging to the same person, may be included in one application.

(3) Registered land shall be subject to the same rights and burdens, may be dealt with by the owner and shall be subject to jurisdiction of the courts in the same manner as if it had not been registered, but no voluntary or involuntary transaction shall affect the title until registered.

(4) No title to registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession, except under the act of Nebraska, in which no such exemption exists.

(5) An owner of registered land may convey, mortgage, lease, charge, or otherwise deal with the same as fully as if it had not been registered. He may use any form of deed, mortgage, lease, or other voluntary instrument sufficient in law for the purpose intended.

(6) Every voluntary or involuntary transaction which, if recorded, filed, or entered in any clerk's office, would affect unregistered land, shall, if duly registered in the office of the proper registrar, and not otherwise, be notice to all persons from the time of such registration, and operate in accordance with law and with the provisions of this act upon any registered land in the county or city of such registrar to which it relates.

(7) Upon the original registration of land and also upon the transfer of registered land by the heirs or devisees of deceased owner, there shall be paid to the registrar one-tenth of 1 per cent of the assessed value of the land as determined by the last official assessment for general taxation. Colorado, however, requires the payment of one-eighth of 1 per cent. All money so received by the registrar shall be paid to the State treasurer (or other designated official) and shall be an assurance fund, held in trust, out of which any person who without negligence on his part sustains loss or damage or is deprived of any interest in land after its original registration, through fraud, error, or omission in any entry in the register of titles, is entitled to be compensated for such loss or damage.

In the statutes of four States—Massachusetts, North Carolina, South Carolina, and Mississippi—it is provided that a judgment against the assurance fund shall be payable out of any money in the general fund of the State treasury not otherwise appropriated, whereas in all other statutes a judgment for damages on account of loss sustained as above set out may be paid out of the assurance fund only as it accumulates.

#### PROVISIONS WHICH DRAW IN QUESTION THE CONCLUSIVENESS OF CERTIFICATES OF TITLE ISSUED UNDER THE SEVERAL STATUTES AND RECOGNIZE EXCEPTIONS TO CERTIFICATES.

All statutes contain in terms exceptions to conclusiveness of certificates. All are at least as broad as the following section, quoted from the Virginia law (sec. 73):

Every registered owner of any estate or interest in land brought under this act shall hold the land free from any and all adverse claims, rights, or encumbrances not noted on the certificate of title, except—

First. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this State can not require to appear of record under registry laws.

Second. Taxes and levies assessed thereon but not delinquent.

Third. Any lease for a term not exceeding one year under which the land is actually occupied.

Other statutes make exceptions in conformity with the Minnesota law, which provides (sec. 24):

Every person receiving a certificate of title pursuant to a decree of registration, and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration, shall hold the same free from all encumbrances, and adverse claims, excepting only such estates, mortgages, liens, charges and interests as may be noted in the last certificate of title in the office of the registrar, and also excepting any of the following rights or encumbrances subsisting against the same, if any, namely:

1. Liens, claims, or rights arising or existing under the laws or the Constitution of the United States, which this State can not require to appear of record.

2. The lien of any tax or special assessment for which the land has not been sold at the date of the certificate of title.
3. Any lease for a period not exceeding three years when there is actual occupation of the premises thereunder.
4. All rights in public highways upon the land.
5. Such right of appeal, or right to appear and contest the application, as is allowed by this act.

In addition to the exceptions stated in terms in the statutes the authorities cited and quoted in the accompanying brief show that an initial decree of registration can not be immediately conclusive against all persons in any case (1) wherein the court has not acquired jurisdiction; (2) wherein the court has acquired jurisdiction, but due process of law is lacking with respect to persons entitled, under the statute, to actual notice; (3) that no subsequent transfer of title passing through judicial proceedings can be made immediately conclusive upon registry of decree, but is subject to irregularity and lack of jurisdiction in such proceedings.

The authorities cited and quoted in the brief also show that, while registrars have the power to make entries upon the register of titles, such entries are not conclusive and can not be made immediately conclusive by statutory enactment, but only by the running of a statute of limitations. Consequently exceptions must be made for such contingencies pending the running of such statutes of limitations.

The Supreme Court of Minnesota said in *Baart v. Martin* (99 Minn., 197):

A certificate of title, therefore, though properly registered and authenticated, is only conclusive until it is shown to fall within one of the recognized exceptions.

Exception 5 in section 24 of the Minnesota act above quoted is broad in its terms. In order to determine the extent of its application as well as of similar exceptions contained in other statutes and the application of statutes of limitations in the States providing for such, a review of all statutes has been made. *It appears therefrom that certificates of title, issued under the statutes in the following-named States, are subject to the exceptions set under the State name, either by reason of expressed terms or by necessary implication.*

**EXCEPTIONS TO ALL CERTIFICATES OF TITLE OTHER THAN SUCH AS APPEAR THEREON.**

**ILLINOIS.**

(Laws of 1897, pp. 13-165.)

1. Any subsisting lease or agreement for a lease for a period not exceeding five years where there is actual occupation of the land under lease. The term lease shall include a verbal letting. (Sec. 40.)

2. General taxes for the current or fiscal year in which certificate is issued and special taxes or assessments which have not been confirmed. (Sec. 40.)

3. Such right of appeal, writ of error, right to appear and contest the application, and action to make counter claim as is allowed by this act. (Sec. 40.)

The registered owner of any estate or interest in land brought under this act<sup>1</sup> shall, except in cases of fraud to which he is a party, or of the party through whom he claims without valuable consideration paid in good faith, hold the same subject only to such estate, mortgage, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office and free from all others except:

(1) Any subsisting lease or agreement for a lease for a period not exceeding five years, where there is actual occupation of the land under lease. The term "lease" shall include a verbal letting.

(2) General taxes for the current or fiscal year in which certificate is issued and special taxes or assessments which have not been confirmed.

(3) Such right of appeal, writ of error, right to appear and contest the application, and action to make counter claim as is allowed by this act.—(Sec. 40.)

4. The right of persons, not bound by the initial decree because of some irregularity, insufficiency or other cause, to open or set aside the decree of registration within two years after entry. (Sec. 27.)

No person shall commence any action at law or in equity for the recovery of lands or assert any interest or right in or lien or demand upon the same, or make entry thereon adversely to the title or interest as found, ordered or decreed by the court, unless within two years after the entry of the order or decree. This section shall be construed as giving such right of action to such persons only as shall not, because of some irregularity, insufficiency, or for some other cause, be bound and concluded by such order or decree.—(Sec. 27.)

5. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (Sec. 92.)

Any person making any claim to or asserting any lien upon registered land not existing at the initial registry of the same and not shown upon the register, or adverse to the title of the registered owner, and no other provision is herein made for asserting the same in the registrar's office, may make affidavit thereof setting forth his interest, right, title, lien or demand, and how and under whom derived and the character and nature thereof. The affidavit shall state his place of residence and also his place of business, if he has one, and

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<sup>1</sup> It has been held in the State of Illinois that all certificates of title are issued subject to mechanic's liens.

designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the registrar, the latter shall enter a memorial thereof, as in the case of a charge.—(Sec. 92.)

6. The right to question the action, decision or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction, or other error on the part of registrars in making entries, but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers,<sup>1</sup> contrary to the decisions and principle. (See brief.) (Secs. 94-95.)

Any person feeling himself aggrieved by the action of the registrar or by his refusal to act in any matter pertaining to the first registration of land or any estate or interest therein, after the first registration or any transfer of or charge upon the same, the filing, or neglect or refusal to file any instrument, or to enter or cancel any memorial or notation, or to do any other thing required of him by this act, may file his bill or petition in equity in any court of competent jurisdiction, making the registrar and other persons, whose interest may be affected, parties defendant, and the court may proceed therein as in other cases in equity and make such order or decree as shall be according to equity in the premises and the purport of this act. Nothing in this section contained shall bar such person from filing an original bill or petition in such cases in equity in any court of competent jurisdiction.—(Sec. 94.)

It will be observed that the effect of the foregoing provision is to put "an opinion of registrars" on parity with "an order of court." It is clear that the latter, by reason of its being the result of a judicial proceeding, may be conclusive, whereas the former, an *ex parte* opinion, can not be.

Nothing contained in either of the two preceding sections shall be so construed as to remove the bar of any order or decree, or extend the time of limitation hereinbefore provided,<sup>2</sup> nor to affect the right of any bona fide purchaser or incumbrancer without notice filed with the registrar and noted as in case of other memorials.—(Sec. 95.)

#### CALIFORNIA.

(Statutes, 1915, pp. 1932-1951.)

1. Any subsisting lease or agreement for a lease for a period not exceeding one year, where there is actual occupation of the land under lease. The term "lease" shall include a verbal letting. (Sec. 34.)

<sup>1</sup> Section 69, following, illustrates the theory upon which it is sought to make entries conclusive when certificates pass into the hands of "bona fide purchasers or encumbrancers without notice."

"Upon the filing with the registrar of an order of court or opinion of two examiners, as provided in the last section, and in the latter event upon the registrar also being satisfied that the proposed transfer, charge, or other dealing is in accordance with the true intent and meaning of the trust, condition, or limitation, he shall proceed to register the same, and such registration shall be conclusive evidence in favor of the person taking such transfer, charge, or other right, and those claiming under him, in good faith and for a valuable consideration, that such transfer, charge, or other dealing is in accordance with the true intent and meaning of the trust, condition, or limitation."—(Sec. 69.)

<sup>2</sup> Sec. 27, *supra*.

2. All land embraced in the description contained in the certificate which has theretofore been legally dedicated as or declared by a competent court to be a public highway. (Sec. 34.)

3. Any subsisting right of way or other easement, created within one year before issue of the certificate upon, over, or in respect of the land. (Sec. 34.)

4. Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title. (Sec. 34.)

5. Such right of action or claim as is allowed by this act. (Sec. 34.)

6. Liens, claims, or rights arising under the laws of the United States, which the statutes of California can not require to appear of record upon the register. (Sec. 34.)

The registered owner of any estate interest in land brought under this act shall, except in case of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office, and free from all others, except:

1. Any subsisting lease or agreement for a lease for a period not exceeding one year, where there is actual occupation of the land under lease. The term "lease" shall include a verbal letting.

2. All land embraced in the description contained in the certificate which has theretofore been legally dedicated as or declared by a competent court to be a public highway.

3. Any subsisting right of way or other easement, created within one year before issue of the certificate upon, over, or in respect of the land.

4. Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title.

5. Such right of action or claim as is allowed by this act.

6. Liens, claims, or rights arising under the laws of the United States, which the statutes of California can not require to appear of record upon the register.—(Sec. 34.)

7. The right of persons, not bound by the initial decree because of some irregularity, insufficiency or other cause, to open or set aside the decree of registration *within one year* after entry. (Sec. 45.)

No person shall commence any action at law or in equity for the recovery of land, or assert any interest or right in, or lien or demand upon the same, or make entry thereon adversely to the title or interest certified in the first certificate bringing the land under the operation of this act after one year following the first registration. It shall not be an exception to this rule that the person entitled to bring the action or make the entry is deceased, an infant, lunatic, or is under any disability, but action may be brought by such person by his next friend or guardian or by the administrator or the executor of a deceased person. It shall be the duty of the guardian, if there is any, to bring action in the name of his ward whenever it is necessary to preserve or enforce the ward's rights in registered land; provided, however, before such action shall proceed, it must be made to appear to the court that the person bringing such action or those under whom he claims, had no actual notice of the proceedings to register such lands in time to appear and file his objections or assert his claim. The

provisions of this section shall in no way affect or disturb the rights of any person in said land, acquired subsequent to the registration thereof, bona fide and without knowledge and for a valuable consideration.<sup>1</sup>—(Sec. 45.)

Since the statute of limitations provided in the first paragraph of section 45, supra, is deemed necessary in order to satisfy *constitutional* demands, it seems unlikely that the provisions of the paragraph may be emasculated by the legislative declaration in the latter part of section 45 and in section 36, supra.

The comments in this footnote and in the foregoing footnotes under "Illinois" are applicable to the theory upon which all statutes move excepting those in Ohio, Virginia, and Georgia.

8. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (Sec. 98.)

A registered owner or other person in interest or the registrar may at any time apply by petition to the court, upon the ground that registered interests of any description, whether vested, contingent, expectant, or inchoate, have terminated and ceased or that new interests have arisen or been created which do not appear upon the certificates or that there is an error or omission in any certificate or memorial, or that any certificate or memorial has been made, entered, indorsed, issued, or canceled by mistake, or that the name of any person on the certificate has been changed by divorce, adoption, or other than by marriage as provided for in section 28 of this act, or that an owner, registered as married, has ceased to be such, or that a corporation which owned registered land has been dissolved and has not legally conveyed the same after its dissolution, or, upon any other reasonable ground, for an order correcting or altering any certificate to comply with the true facts as shown by the petition and proof adduced, and the court shall have jurisdiction to hear and determine the petition after notice to all parties in interest.—(Sec. 98.)

9. The right to question the action, decision, or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction or other error on the part of registrars in making entries but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle. (See brief.) (Sec. 33.)

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<sup>1</sup> Section 36, following, illustrates the theory upon which certificates or original entry are sought to be made conclusive immediately upon entry:

"Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner, shall be held to inquire into the circumstances under which, or the consideration for which, such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand, or interest; and the knowledge that any unregistered trust, lien, claim, demand, or interest is in existence shall not of itself be imputed as fraud."

Any person feeling himself aggrieved by the action of the registrar, or by his refusal to act in any manner pertaining to the first registration of land, or any subsequent transfer, or charge upon the same, or failing or neglecting, or refusing to file any instrument, or to enter or cancel any memorial or notation, or to do any other thing required of him by this act, may file a complaint in the superior court making the registrar and other persons, whose interest may be affected, parties defendant, and the court may proceed therein as in other cases, and make such order or decree as shall be according to equity and the purport of this act. A certified copy of such order or decree shall be presented to the registrar, who shall file the same and make such entry thereof as by this act required.—(Sec. 33.)

#### MASSACHUSETTS.

(Acts 1898, ch. 562. Revised Laws, 1911, ch. 128.)

1. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this Commonwealth can not require to appear of record in the registry. (Sec. 38.)

2. Taxes, within two years after they have been committed to the collector. (Sec. 38.)

3. Any highway, town way, or any private way laid out under the provisions of section 65 of chapter 48 if the certificate of title does not state that the boundary of such way has been determined. (Sec. 38.)

4. Any lease for a term not exceeding seven years. (Sec. 38.)

5. Any liability to assessment for betterments, or other statutory liability which may attach to land in this Commonwealth as a lien prior to, or independent of, the recording or registering of any paper; but if there are easements or other rights appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to pass with the land until cut off or extinguished by the registration of the servient estate, or in any other manner. (Sec. 38.)

Every applicant who receives a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate, and any of the following encumbrances which may be existing:

First. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this Commonwealth can not require to appear of record in the registry.

Second. Taxes, within two years after they have been committed to the collector.

Third. Any highway, town way, or any private way laid out under the provisions of section sixty-five of chapter forty-eight if the certificate of title does not state that the boundary of such way has been determined.

Fourth. Any lease for a term not exceeding seven years.

Fifth. Any liability to assessment for betterments, or other statutory liability which may attach to land in this Commonwealth as a lien prior to, or independent of, the recording or registering of any paper; but if there are easements or other rights appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to pass with the land until cut off or extinguished by the registration of the servient estate, or in any other manner.—(Sec. 38.)

6. The statute does not make valid provision by a statute of limitation<sup>1</sup> for barring claims which survive an initial decree because of the statute not having been followed or other irregularity in the initial proceeding to quiet title. (Sec. 13.)

Every order, decision, and decree of the court whereby any party is aggrieved shall be subject to appeal to the superior court for the county in which the land lies, to which such order, decision, or decree relates as to any questions involved therein. The appeal shall be claimed and entered and issues framed therefor in the land court within *thirty days* after the date of such order, decision, or decree, and upon the entry of the appeal the appellant shall file in the superior court copies of all material papers in the case, certified by the recorder; but no matters shall be tried in the superior court except those specified in the appeal. Appearances and answers shall be filed in the superior court within thirty days after the appeal has been entered, unless for good cause further time is allowed. Upon the motion of either party the cause shall be advanced for speedy hearing, and shall be tried by the court, unless either party within the time allowed for entering appearance claims a trial by jury. Questions of law arising in the superior court may be taken to the supreme judicial court for revision by any party aggrieved by any opinion, ruling, direction, or judgment of the court, in the same manner as in proceedings at law in said court.

Questions of law arising in the land court on any decision or decree may be taken by any party direct to the supreme judicial court for revisions, in the same manner as questions of law are taken to that court from the superior court. The land court, after any decision or decree dependent upon a question of law, may report such decisions or decree, with so much of the case as is necessary for understanding such questions of law, for the determination of the supreme judicial court.—(Sec. 13.)

7. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (Sec. 105.)

Whoever claims any right or interest in registered land adverse to the registered owner which arises subsequent to the date of original registration may,

<sup>1</sup> It is claimed by the author of the Virginia act that section 13 operates as a statute of limitations. If such be true, exception 6 ceases upon expiration of 30 days after entry of decree of initial proceedings. It seems that while the section might be sufficient to bar claims surviving by reason of some trivial irregularity, it is not sufficiently explicit to bar in more serious cases of jurisdictional defects.

if no other provision is made in this chapter for registering the same, make a statement in writing setting forth fully his alleged right or interest, and how or under whom it was acquired, and a reference to the volume and page of the certificate of title of the registered owner, and a description of the land in which the right or interest is claimed. The statement shall be signed and sworn to, and shall state the adverse claimant's residence, and designate a place at which all notices may be served upon him. This statement shall be entitled to registration as an adverse claim, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the question of the validity of such adverse claim, and shall enter such decree thereon as justice and equity may require. If the claim is adjudged to be invalid, the registration shall be canceled. If the court, after notice and a hearing, finds that a claim thus registered was frivolous or vexatious, it may tax the adverse claimant double costs.—(Sec. 105.)

8. The right to question the action, decision, or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction, or other error on the part of registrars in making entries, but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle. (See brief.)

#### MINNESOTA.

(General Laws, 1905, ch. 305.)

1. Liens, claims, or rights arising or existing under the laws or the Constitution of the United States which this State can not require to appear of record. (Sec. 24.)

2. The lien of any tax or special assessment for which the land has not been sold at the date of the certificate of title. (Sec. 24.)

3. Any lease for a period not exceeding three years when there is actual occupation of the premises thereunder. (Sec. 24.)

4. All rights in public highways upon the land. (Sec. 24.)

5. Such right of appeal or right to appear and contest the application as is allowed by this act. (Sec. 24.)

Every person receiving a certificate of title pursuant to a decree of registration, and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration, shall hold the same free from all encumbrances and adverse claims, excepting only such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar, and also excepting any of the following rights or encumbrances subsisting against the same, if any, namely:

1. Liens, claims, or rights arising or existing under the laws or the Constitution of the United States which this State can not require to appear of record.

2. The lien of any tax or special assessment for which the land has not been sold at the date of the certificate of title.

3. Any lease for a period not exceeding three years when there is actual occupation of the premises thereunder.

4. All rights in public highways upon the land.

5. Such right of appeal, or right to appear and contest the application, as is allowed by this act.—(Sec. 24.)

6. The right of persons, not bound by the initial decree because of some irregularity, insufficiency, or other cause, to open or set aside the decree of registration within six months after entry. (Sec. 27.)

Statute of limitation: No decree of registration heretofore entered, and no original certificate of title heretofore issued pursuant thereto, shall be adjudged invalid or set aside unless the action in which the validity of such decree of registration, or original certificate of title issued pursuant thereto, is called in question, be commenced, or the defense alleging the invalidity thereof be interposed within six (6) months from the date when this law takes effect. No decree of registration hereafter entered, and no original certificate of title hereafter issued pursuant thereto, shall be adjudged invalid or set aside, unless the action in which the validity of such decree, or of the original certificate of title issued pursuant thereto, is called in question, be commenced, or the defense alleging the invalidity thereof be interposed, within six (6) months from the date of such decree.

No action or proceeding either at law or in equity for the recovery of any right, title, interest, or estate in registered land adverse to the title established and adjudicated by any original decree of registration heretofore entered shall be maintained unless such action is commenced within six months from the date when this law takes effect, and no action or proceeding for the recovery of any right, title, interest, or estate in registered land adverse to the title established by any original decree of registration hereafter entered shall be maintained, unless such action is commenced within six months from the date of such original decree.

No action or proceeding for the enforcement or foreclosure of any lien or charge upon or against registered land, which existed at the date when any original decree of registration was heretofore entered and which was not recognized and established by such decree, shall be maintained, unless such action or proceeding is commenced within six months from the date when this law takes effect. No action or proceeding for the enforcement or foreclosure of any lien or charge upon or against registered land, in existence at the date of any original decree of registration hereafter entered, and which is not recognized and established by such decree, shall be maintained, unless such action or proceeding is commenced within six months from the date of such original decree.—(Sec. 27.)

7. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (Sec. 68.)

Any person claiming any right, title, or interest in registered land adverse to the registered owner thereof arising subsequent to the date of the original registration, may, if no other provision is made in this act for registering the same, file with the registrar his verified statement in writing, setting forth fully his alleged right or interest, and how or from whom it was acquired, and

a reference to the volume and page of the certificate of title of the registered owner, together with a description of the land, the adverse claimant's residence, and designating a place at which all notices may be served upon him. Such statement shall be entitled to registration as an adverse claim, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the validity of such adverse claim, and shall enter such decision and decree therein as justice and equity may require. If the adverse claim is adjudged to be invalid, the registration thereof shall be canceled. The court may, in any case, award such costs and damages, including a reasonable attorney's fee, as it may deem just.—(Sec. 68.)

8. The right to question the action, decision or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction, of other error on the part of registrars in making entries, but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle. (Sec. 69.)

No erasure, alteration, or amendment shall be made upon the register of titles after the entry of a certificate of title, or of any memorial thereon, and the attestation of the same by the registrar, except by order of the court. A registered owner or other person in interest may at any time apply by petition to the court, upon the grounds that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased; or that new interests have arisen or been created which do not appear upon the certificate; or that any error or omission was made in entering a certificate or any memorial thereon, or on any duplicate certificate; or that the name of any person on the certificate has been changed; or that the registered owner has married, or, if registered as married, that the marriage has been terminated; or that a corporation which owned registered land and has been dissolved has not conveyed the same within three years after its dissolution; or upon any other reasonable ground; and the court may hear and determine the petition after notice to all parties in interest, and may order the entry of a new certificate or grant any other relief upon such terms, requiring security if necessary, as it may consider proper; but the provisions of this section shall not give the court authority to open the original decree of registration, and nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser who holds a certificate for value and in good faith, or of his heirs or assigns, without his or their written consent.—(Sec. 69.)

#### OREGON.

(General Laws, 1901, pp. 438-467.)

1. Any subsisting lease or agreement for a lease, for a period not exceeding five years, where there is actual occupation of the land under the lease. The term "lease" shall include a verbal letting. (Sec. 39.)

2. All public highways embraced in the description of the lands in the certificate shall be deemed to be excluded from the certificate. (Sec. 39.)

3. Any subsisting right of way or other easement, however created, upon, over or in respect of the land. (Sec. 39.)

4. Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title. (Sec. 39.)

5. Such right of appeal, right to appear and contest the application, and of such action, or to make counterclaims, as is allowed by this act. (Sec. 39.)

The registered owner of any estate or interest in land brought under this act, shall, except in cases of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and free from all others except:

1. Any subsisting lease or agreement for a lease, for a period not exceeding five years, where there is actual occupation of the land under the lease. The term "lease" shall include a verbal letting.

2. All public highways embraced in the description of the lands in the certificate shall be deemed to be excluded from the certificate.

3. Any subsisting right of way or other easement, however created, upon, over, or in respect of the land.

4. Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title.

5. Such right of appeal, right to appear and contest the application, and of such action, or to make counterclaim, as is allowed by this act.—(Sec. 39.)

6. The right of persons, not bound by the initial decree because of some irregularity, insufficiency, or other cause, to open or set aside the decree of registration within two years after entry. (Sec. 26; same as sec. 27, Ill., supra.)

7. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (Sec. 91; same as sec. 92, Ill., supra.)

8. The right to question the action, decision, or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction, of other error on the part of registrars in making entries, but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle. (See brief.) (Sec. 93.)

Any person feeling himself aggrieved by the action of the registrar, or by his refusal to act, in any manner pertaining to the first registration of land, or any estate or interest therein, after the first registration or any transfer of or charge upon the same, the filing or neglect or refusal to file any instru-

ment, or to enter or cancel any memorial or notation, or to do any other thing required by him by this act, may file his bill or petition in equity in any court of competent jurisdiction, making the registrar and other persons whose interests may be affected, parties defendant, and the court may proceed therein as in other cases in equity, and make such order or decree as shall be according to equity in the premises and the purport of this act.—(Sec. 93.)

#### COLORADO.

(Session Laws, 1903, ch. 139. Revised Statutes, 1908, pp. 334–335.)

1. Liens, claims, or rights arising or existing under the laws or the Constitution of the United States, which this State can not require to appear of record. (Sec. 30.)

2. The lien of any tax or special assessment for which the land has not been sold at the date of the certificate of title. (Sec. 30.)

3. Any lease for a period not exceeding three years when there is actual occupation of the premises thereunder. (Sec. 30.)

4. All rights in public highways upon the land. (Sec. 30.)

5. Such right of appeal, or right to appear and contest the application as is allowed by this act. (Sec. 30; same as sec. 24, Minn., supra.)

6. The right of persons, not bound by the initial decree because of some irregularity, insufficiency or other cause, to open or set aside the decree of registration within 90 days after entry. (Sec. 29.)

No person shall commence any action at law or in equity for the recovery of lands or assert any interest or right in or lien or demand upon the same, or make entry thereon adversely to the title or interest as found, ordered, or decreed by the court, unless within ninety days after the entry of the order or decree. This section shall be construed as giving such right of action to such persons only as shall not, because of some irregularity, insufficiency, or for some other cause, be found and concluded by such order or decree.—(Sec. 29.)

7. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (Sec. 82.)

Any person claiming any right or interest in registered land, adverse to the registered owner arising subsequent to the date of the original registration may if no other provision is made in this act for registering the same, make statement in writing, setting forth fully his alleged right or interest, and how or under whom acquired, and a reference to the volume or page of the certificate of title of the registered owner, and a description of the land to which the right or interest is claimed. The statement shall be signed and sworn to and shall state the adverse claimant's residence and designate a place at which all notices may be served upon him. This statement shall be entitled

to registration as an adverse claim, and the court, upon the petition of any party in interest, shall grant a speedy hearing upon the question of the validity of such adverse claim, and shall enter such decree thereon as equity and justice may require. If the claim is adjudged to be invalid, its registration shall be canceled. The court may, in any case, award such costs and damages, including reasonable attorney's fees, as it may deem just in the premises.—(Sec. 82.)

8. The right to question the action, decision, or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction, or other error on the part of registrars in making entries, but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle. (See brief.) (Sec. 89.)

No erasure, alteration, or amendment shall be made upon the register of title after the entry of a certificate of title or a memorial thereon and the alteration of the same by the registrar of titles, except by order of the court. Any registered owner or other person in interest may at any time apply by petition to the court, upon the ground that registered interests of any description, whether vested, contingent, expectant, or inchoate, have terminated and ceased; or that new interests have arisen or been created which do not appear upon the certificate, or that an error, omission, or mistake was made in entering a certificate; or any memorial thereon; or any duplicate certificate; or that the name of any person upon the certificate has been changed; or that the registered owner has been married, or if registered as married, that the marriage has been terminated, or that a corporation that owned registered land has been dissolved and has not conveyed the same within three years after its dissolution; or upon any other reasonable ground; and the court shall have jurisdiction to hear and determine the petition, after such notice as it may order to all parties in interest, and may order the entry of a new certificate, the entry or cancellation of a memorial upon a certificate, or grant any other relief upon such terms and conditions, requiring security if necessary, as it may deem proper; provided, however, that this section shall not be construed to give the court authority to open the original decree of registration, and that nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith or his heirs or assignees, without his or their consent.—(Sec. 89.)

#### WASHINGTON.

(Session Laws, 1907, pp. 693-738.)

1. Liens, claims, or rights arising or existing under the laws or the Constitution of the United States, which this State can not require to appear of record. (Sec. 30.)

2. The lien of any tax or special assessment for which the land has not been sold at the date of the certificate of title. (Sec. 30.)

3. Any lease for a period not exceeding three years when there is actual occupation of the premises thereunder. (Sec. 30.)

4. All rights in public highways upon the land. (Sec. 30.)

5. Such right of appeal, or right to appear and contest the application as is allowed by this act. (Sec. 30; same as sec. 24, Minnesota, *supra*.)

6. The right of persons, not bound by the initial decree because of some irregularity, insufficiency, or other cause, to open or set aside the decree of registration within 90 days after entry. (Sec. 29; same as sec. 29, Colorado, *supra*.)

7. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (Sec. 81; same as sec. 82, Colorado, *supra*.)

8. The right to question the action, decision or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction or other error on the part of registrars in making entries, but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle. (See brief.) (Sec. 88; same as sec. 89, Colorado, *supra*.)

#### NEW YORK.

(Consolidated Laws, 1909, ch. 52. Laws. 1916, ch. 547.)

1. Liens, claims, or rights arising or existing under the laws or Constitution of the United States, which the statutes of this State do not require to appear of record. (Sec. 400.)

2. Any tax, water rate, or assessment which becomes a lien on the property after initial registration and for which a sale has not been made. (Sec. 400.)

3. Any lease or agreement for a lease, made after or pending registration, for a period not exceeding one year, where there is actual occupation of the land under the lease or agreement. (Sec. 400.)

4. Easements or servitudes which accrue against the property after initial registration in such manner as not to require their registration. (Sec. 400.)

A person who receives a certificate of title pursuant to a judgment of registration except in case of fraud to which he is a party, and a purchaser of registered real property, who takes a certificate of title for value and in good faith, shall hold the same free from all encumbrances, charges, trusts, liens, and transfers, except those noted on the certificate in the registrar's office, and any of the following which may exist:

First. Liens, claims, or rights arising or existing under the laws of Constitution of the United States, which the statutes of this State do not require to appear of record.

Second. Any tax, water rate, or assessment which becomes a lien on the property after initial registration and for which a sale has not been made.

Third. Any lease or agreement for a lease, made after or pending registration, for a period not exceeding one year, where there is actual occupation of the land under the lease or agreement.

Fourth. Easements or servitudes which accrue against the property after initial registration in such manner as not to require their registration.

Except as specified in the foregoing statement of exceptions, no encumbrance, charge, trust, lien, or transfer shall take effect upon or over real property the title to which has been registered, unless the instrument creating and setting forth such encumbrance, charge, trust, lien, or transfer has been filed.—(*Sec. 400.*)

5. The right of persons, not bound by the initial decree because of some irregularity, insufficiency, or other cause, to open or set aside the decree of registration within six months after entry. (*Sec. 392.*)

Any title registration procured by or as a result of fraud may be set aside in the same manner and by the same proceedings as in case of a deed obtained by fraud, provided that such proceeding for setting aside the registration shall not injuriously affect the rights of an innocent purchaser or encumbrancer of the property after such registration, for value and without actual knowledge of fraud, and provided further that the action or other proceeding to set aside such registration be commenced within ten years from the time when the final judgment of registration was entered. No action or proceeding shall lie or be commenced except on the ground of fraud as above stated, to set aside any judgment of registration or to modify or affect the same or for the recovery of registered property or any estate, right, or interest in or lien upon the same, or any part thereof, or make any entry thereon, adversely to the title or interest registered therein, as directed by a final judgment of the court unless such action or proceeding is commenced within six months after such judgment of registration is entered.—(*Sec. 392.*)

6. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (*Sec. 422.*)

Reference of doubtful matter to the court: When the registrar is in doubt, and the parties in interest fail to agree as to the proper memorial to be made in the title book of any deed, mortgage, or other voluntary instrument presented for registration, the question shall be referred to the court for decision, either on the certificate of the registrar stating the question, or upon the suggestion in writing of any party or parties in interest; and the court, after due notice to all the parties in interest, and a hearing, if necessary or proper, shall enter an order prescribing the form of the memorial to be made by the registrar, who shall make the memorial accordingly. In any judicial proceeding affecting property, the title to which is then a registered title, the court upon the application in writing of any party or parties in interest, after due notice to all

other parties in interest, and a hearing, if necessary or proper, shall enter an order prescribing the form of any memorial that should be made by the registrar in the title book because of or as the result of such proceeding; and the registrar, upon the production of a certified copy of such order, shall make the proper memorial in accordance with such order. After making such memorial in the title book the registrar shall also make all other memorials on existing certificates or make and deliver any new certificate according to the circumstances and in the manner required herein.—(Sec. 422.)

#### NORTH CAROLINA.

(Acts, 1913, Ch. 90.)

1. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this State can not require to appear of record under registry laws. (Sec. 25.)

2. Taxes and assessments thereon due the State or any county, city, or town therein, but not delinquent. (Sec. 25.)

3. Any lease for a time not exceeding three years, under which the land is actually occupied. (Sec. 25.)

Every registered owner of any estate or interest in land brought under this act shall, except in cases of fraud, to which he is a party or in which he is a privy without valuable consideration paid in good faith, and except when registration has been procured through forgery, hold the land, free from any and all adverse claims, rights, or encumbrances not noted on the certificate except (1) liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this State can not require to appear of record under registry laws; (2) taxes and assessments thereon due the State or any county, city, or town therein, but not delinquent; (3) any lease for a time not exceeding three years, under which the land is actually occupied. Any person making any claim to or asserting any lien or charge upon registered land existing at the initial registry of the same and not shown upon the register, or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the registry of titles may make affidavit thereof setting forth his interest, right, title, lien, or demand and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the superior court the latter shall order a note thereof as in the case of charges or encumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the entry of such note, unless for cause shown the clerk shall extend the time. Upon the failure to commence such action within the time prescribed therefor the clerk shall order a cancellation of such note. If any person shall wantonly or maliciously or without reasonable cause procure such notation to be entered upon the registry of titles, having the affect of a cloud upon the registered owner's title, he shall be liable for all damages the owner may suffer thereby.—(Sec. 25.)

Section 25 shows the intention of the statute to be to fix no statute of limitations. Certificates of title issued thereunder, therefore, are subject to the further exceptions.

4. The statute does not make valid provision by a statute of limitations for barring claims which survive an initial decree because of the statute not having been followed or other irregularity in the initial proceeding to quiet title. (Sec. 25, supra.)

5. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity.

6. The right to question the action, decision or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction, or other error on the part of registrars in making entries, but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle.

#### SOUTH CAROLINA.

(Acts, 1916.)

(In all respects here under consideration the South Carolina statute is similar to that of North Carolina, supra.)

#### MISSISSIPPI.

(Laws, 1914, ch. 131.)

(In all respects here under consideration the Mississippi statute is similar to that of North Carolina, supra.)

#### OHIO.

(Laws, 1913, pp. 914-960.)

1. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this State can not require to appear of record in the recorder's office. (Sec. 25.)

2. Taxes, within six years after they have been entered upon the tax duplicates and become due and payable. (Sec. 25.)

3. Any highway, public way, or private way laid out or acquired under provisions of law or otherwise, unless the certificate of title states that the nonexistence of such way, or the boundaries thereof, if the same exists, have been determined by the court. (Sec. 25.)

4. Any lease for a term not exceeding three years, when there is actual possession under the lease. (Sec. 25.)

5. Right of appeal and to prosecute error within 30 days after decree of registration. (Sec. 25.)

6. (Expressly specified in sec. 25 below, but a favorable exception.) If there are easements or other rights appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to have passed with the land. (Sec. 25.)

Every applicant who without fraud on his part receives a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, shall hold the same free from all estates and encumbrances except those noted on the certificate and any of the following estates and encumbrances which may be existing:

First. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this State can not require to appear of record in the recorder's office.

Second. Taxes, within six years after they have been entered upon the tax duplicates and become due and payable.

Third. Any highway, public way, or private way laid out or acquired under provisions of law or otherwise, unless the certificates of title state that the nonexistence of such way, or the boundaries thereof, if the same exists, have been determined by the court.

Fourth. Any lease for a term not exceeding three years, when there is actual possession under the lease.

Fifth. Right of appeal and to prosecute error within thirty days after decree of registration.

Sixth. If there are easements or other rights appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to have passed with the land. This section shall be printed or written on all duplicate certificates of title before delivery by the recorder.— (Sec. 25.)

7. The right of persons, not bound by the initial decree because of some irregularity, insufficiency, or other cause, to open or set aside the decree of registration within 30 days after entry. (Sec. 25.)

If the court after hearing finds that the applicant has title in whole or in part as stated in his application, and proper for registration, then to the extent of the title so found a decree of confirmation and registration shall be entered, which shall have the effect of a decree in rem and, subject only to the exceptions stated in section 25 shall bind the land and all interests, rights and estates therein and liens and charges thereon and, after the expiration of the time to prosecute error or appeal and except as otherwise provided in this act, shall be absolutely conclusive upon and against all persons, including the State or any political subdivision thereof, whether mentioned by name in the application, notice or other papers in the case, or as unknown heirs or devisees, or included in the general descriptions "all other persons, if any, having any right or interest in or lien upon the land or any part thereof," and whether under disability, not in being, unknown or unascertained; and after the expiration of the time for prosecuting error or appeal,

except as otherwise provided in this act, no such person shall in any of the courts of this State assert by suit or otherwise any claim to an interest or estate in or lien or charge upon registered land in derogation of or contrary to the purport of such decree. Such decree shall not, after the expiration of the time for prosecuting error or appeal, be opened by reason of the absence, infancy, or other disability of any person affected thereby, nor by any suit or proceeding at law or in equity for opening up judgments or decrees by reason of a party not having had actual notice of the suit or proceeding; but any person deprived of land or any estate or interest therein or lien or charge thereon by a decree of registration obtained by fraud may file a petition in the case to open up and review the same within one year after the entry of the decree, providing any innocent purchaser of value, mortgagee, or other lien holder has acquired an interest. If there is any such purchaser, mortgagee, or lien holder the decree of registration shall not as to them or any person holding under them be opened, but shall remain in force and effect forever, subject only to the right of appeal and to prosecute error. But any person who is aggrieved by such decree in any case may pursue his remedy by action of tort against the applicant or against any other person for fraud in procuring the decree.

Every decree of registration shall bear date of the year, month, day, hour, and minute of its entry and shall be signed by the clerk. It shall give the residence and address of the owner of the land registered, state whether he or she is married or unmarried, and if married, the name of the husband or wife; if such owner is under disability it shall state the nature of the disability, and if a minor, shall state his age. It shall contain an accurate description and plat of each separate parcel of the land as finally determined and adopted by the court, shall set forth the estate of the owner and also, in such manner as to show the relative priority, or particular estates, mortgages, easements, liens, attachments, and other encumbrances, including rights of husband or wife, if any, to which the land or the owner's estate is subject and all suits pending by or against the owner or any of his predecessors in title in any court of record in the county the judgments in which might affect the land or the owner's title thereto and also all such suits elsewhere pending if the same were brought to the attention of the court by the pleadings or evidence in the case, and may contain any other matter properly to be determined by the court in pursuance of this act. The decree shall be stated in a form convenient for transcription upon or binding in the register or certificates of title hereafter mentioned and in a form suitable to constitute it a certificate of title and shall so far as possible give the full name, residence, and post-office address of each owner and holder of any estate or interest in or lien or charge upon the land or any part thereof. The clerk, under the direction of the court, shall make and keep indexes of all applications and all decrees of registration.—(Sec. 22.)

8. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (Sec. 68.)

Any person desiring to assert any interest in or lien or claim against registered land adverse to the title of any registered owner, and not shown upon

the register when no provision is by this act made for registering the same in the recorder's office, may make affidavit thereto, setting forth his interest, right, title, claim, lien, charge or demand, and how and under whom derived, and the character and nature thereof. The affiant shall state his full name, place of residence and post-office address and shall designate a place within the State at which all notices relating thereto may be served upon him; or if he be a nonresident of the State, the name, residence, and post-office address of some person residing within the State upon whom service may be made as his agent and by which service he will be bound the same as if made upon the claimant within the State. Upon the filing of such affidavit in the recorder's office the recorder shall enter forthwith a memorial thereof, upon the registered certificate of title, stating the exact time when said affidavit was filed and the purport and nature thereof.—(Sec. 68.)

9. The right of any person in interest to question the action, finding, or decision of registrars with respect to entries within three (3) days after making of the entry questioned. Should the three-day period be held to be unreasonably short as a statute of limitations, the right attempted to be barred by this section would be a continuing right, or at least subject to general statutes. (Sec 79.)

Any person feeling himself aggrieved by the action, finding, or decision of the recorder, or by his refusal to act, in any matter pertaining to the first registration of land, or any subsequent transfer, or charge, lien, interest, or estate in or upon the same, or by his filing, or failing, neglecting, or refusing to file, any instrument, or entering or canceling, or failing, neglecting, or refusing to enter or cancel, any memorial or notation, or by his wrongfully doing, or by his failing, neglecting, or refusing to do, any other thing required of him by this act, may within *three days* thereafter file with the recorder a written notice of intention to appeal, and shall within ten days thereafter file in the common pleas court a petition setting forth the matter complained of and making the recorder and other persons whose interests may be affected parties defendant, who shall be notified by summons or other process as provided by law in civil actions or by registered mail and other process as provided in cases of original registration. Such person shall also file with this petition a bond with sureties to the approval of the clerk in such sum as may be fixed by a judge of said court or of the probate court conditioned for the due prosecution of such proceeding and payment of all costs and of all damages which any person in interest may suffer in case the judgment of the court should be against the appellant. The recorder shall forthwith after the filing of such bond file with the clerk of the court a statement or transcript of his doing in the matter complained of. The court shall proceed therein as in other cases and make such order or decree as shall be according to law and equity in the premises and the provisions of this act. The clerk of the court making such order shall, under the seal of the court, make and deliver to the recorder a certified copy thereof who shall file and make entry of the same and otherwise act in pursuance of and according to the terms and directions of such order. Such order shall be final and conclusive.—(Sec. 79.)

#### NEBRASKA.

(Acts of 1915, ch. 225.)

1. Any subsisting lease or agreement for a lease for a period not exceeding five years, where there is actual occupation of the land

under lease. The term "lease" shall include a verbal letting. (Sec. 40.)

2. General taxes for the current or fiscal year in which certificate is issued and special taxes or assessments which have not been confirmed. (Sec. 40.)

3. Such right of appeal, writ of error, right to appear and contest the application, and action to make counter claim as is allowed by this act. (Sec. 40; same as sec. 40, Illinois, *supra*.)

4. The right of persons, not bound by the initial decree because of some irregularity, insufficiency, or other cause, to open or set aside the decree of registration within two years after entry. (Sec. 27; same as sec. 27, Illinois, *supra*.)

5. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity. (Sec. 85; same as sec. 92, Illinois, *supra*.)

6. The right to question the action, decision, or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction, or other error on the part of registrars in making entries, but accepts the same as conclusive in certificate in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle. (See brief.) (Sec. 87; same as sec. 93, Oregon, *supra*.)

#### UTAH. (1917.)

#### VIRGINIA. (1916.)

(The statutes of these two States are identical in so far as they cover the matters here considered).

1. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statute of this State can not require to appear of record under registry laws. (Sec. 73.)

2. Taxes and levies assessed thereon but not delinquent. (Sec. 73.)

3. Any lease for a term not exceeding one year under which the land is actually occupied. (Sec. 73.)

Every registered owner of any estate or interest in land brought under this act shall hold the land free from any and all adverse claims, rights, or encumbrances not noted on the certificate of title, except:

First. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which are the statutes of this State can not require to appear of record under registry laws.

Second. Taxes and levies assessed thereon but not delinquent.

Third. Any lease for a term not exceeding one year under which the land is actually occupied.—(Sec. 73.)

4. The statute does not make valid provision by a statute of limitations<sup>1</sup> for barring claims which survive an initial decree because of the statute not having been followed or other irregularity in the initial proceeding to quiet title. (Sec. 11.)

A petition for rehearing of an appeal may be taken, or a bill of review or bill of exceptions, or writ of certiorari may be filed, within ninety days, and not afterwards, from any decree of the court, under the same circumstances, in the same manner and on the same condition as if such decree had been rendered by a circuit court. Said period may not be extended by any disability.—(Sec. 11.)

5. The right of persons not bound by judicial proceedings through which title passes or asserting other claims arising since original registration to set up such claims within 90 days<sup>2</sup> after entry and registration of decree in pursuance of such proceeding or after the arising of such other claim. (Sec. 68.)

Any registered owner of any estate or interest in land, or any person having any claim against registered land arising from any other cause than fraud or forgery since the land was registered, may, within ninety days after the claim or cause of complaint shall have arisen, petition the court for relief in any matter within its jurisdiction; and it shall be the duty of the proper registrar, upon the request of any such person, to register a memorial that such petition has been or will be filed, which memorial shall serve as a caveat and be notice to all persons. (2) And whenever any registrar is in doubt as to the proper registration to be made in any case, or when any person is aggrieved by any act or refusal to act by the registrar, the question may be likewise submitted by petition.—Sec. 68.

6. The right of persons in interest to question the action, finding, or decision of registrars within 90 days of date of entry. (Sec. 68.<sup>2</sup>)

#### GEORGIA.

1917.

1. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this State can not require to appear of record under registry laws. (Sec. 63.)

2. Taxes and levies assessed thereon for the current calendar year. (Sec. 63.)

<sup>1</sup> It is claimed by the author of the Virginia act that section 11 operates as a general statute of limitations. If such be true, exception 4 ceases upon expiration of 90 days after entry of decree in initial proceedings. It seems that while the section might be sufficient to bar claims surviving by reason of some trivial irregularity, it is not sufficiently explicit to bar in more serious cases of jurisdictional defects.

<sup>2</sup> If section 68 be good as a statute of limitations, the right stated in 5 and 6 as being barred by the section expires with the 90-day limitation, otherwise it remains open subject to whatever general statute of limitation may control. Since section 68 seeks to abridge the general statute, the safer wording would seem to be, not "may within 90 days," but "may not, unless within 90 days," admittedly an extremely narrow and technical view, yet the subject of the statute is ruled by technicalities.

3. Any lease for a term not exceeding three years, under which the land is actually occupied. (Sec. 63.)

4. Highways in public use and railroads in actual operation. (Sec. 63.)

5. The right of an interested person to attack or to set aside any transaction for fraud or forgery to which he is not a party within seven years from the date of the transaction or of the registration to which the same relates. (Sec. 63.)

Every registered owner of any estate or interest in land brought under this act shall, except in cases of fraud or forgery to which he is a party, or to which he is a privy without valuable consideration paid in good faith, hold the land free from any and all adverse claims, rights, or encumbrances not noted on the certificate of title in the Title Register, except:

First. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of this State can not require to appear of record under registry laws.

Second. Taxes and levies assessed thereon for the current calendar year.

Third. Any lease for a term not exceeding three years, under which the land is actually occupied.

Fourth. Highways in public use and railroads in actual operation.

No proceedings to attack or to set aside any transaction for such fraud or such forgery as is referred to in this section shall be brought or be entertained by any court, unless the same shall have been brought within seven years from the date of the transaction or of the registration to which the same relates. Nothing herein shall conflict with the provisions of this act allowing attack for good cause to be made upon a registration made by the clerk at any time within twelve months from the date of such registration.—(Sec. 63.)

6. The right of persons not served who are, under the statute, entitled to actual notice and the right of all persons in cases wherein the initial proceedings have not followed the statute with the result that jurisdiction was not acquired are sought to be foreclosed by section 13, quoted below. It seems that if there should be such irregularity in proceedings that the court does not acquire jurisdiction, recitals in a decree would be nullities and the rights of such persons to maintain an action of recovery would remain open, since there is no statute of limitations provided. (Sec. 13.)

\* \* \* The recital of service of process and of the giving and publishing of notices, contained in the decree or final judgment in the cause, *shall be conclusive evidence that such service, publication and notice have been legally given*; provided, however, that nothing herein shall prevent any person aggrieved from having his right of action against any sheriff who makes a false return of service, or against any clerk or examiner who falsely attests a waiver or acknowledgment of service, or any clerk who fails to publish the notice or to mail the notices as required by this act.—(Sec. 13.)

7. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to

original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity.

8. The right of persons at interest to question the correctness of any entry, notation, or registration within 12 months from the date of the making of the same. (Sec. 59.)

The clerk of the superior court is charged with the primary duty of determining whether any instrument, writing, or record or other matter is in proper shape for registration, and with the duty of correctly and legally making the registration, including all formal incidents thereto, and shall be liable to any injured person for any failure of duty in this respect. All registrations of title and all entries and notations made by him upon the title register of transfers or of the cancellation or discharge of liens or encumbrances, shall be prima facie conclusive; and unless a caveat be filed, as provided for in this act, seeking to set aside, modify or otherwise effect such entry, notation or registration within twelve months from the date of the making of the same upon the title register the same shall become absolutely conclusive upon all persons; *this to be considered and construed as a statute of limitations against the questioning of the correctness of the clerk's action*, and is to be without exception on account of disabilities but shall not operate as a limitation in favor of the clerk as to any action against him for wrongdoing or neglect of duty. In the event application is made to a clerk to have any transfer or other transaction registered or noted, and he shall be in doubt as to whether the same should be registered, entered or noted, or shall be in doubt in regard to any detail thereof, either the clerk or any party at interest may petition the judge of the court for direction, and such judge, after it shall have appeared that the parties at interest have had reasonable notice, may proceed to hear the matter and to give directions and instructions to the clerk, whose duty it shall be to follow the directions and instructions of the court. In all matters required of the clerk under this act, he shall be subject to the direction and orders of the court.—(Sec. 59.)

#### NORTH DAKOTA.

(1917.)

#### SOUTH DAKOTA.

(1917.)

(The statutes of these two States are identical in so far as they cover the matters here being considered.)

1. Liens, claims, or rights, arising or existing under the laws or Constitution of the United States, which the State can not require to appear of record. (Sec. 24.)

2. The lien of any tax or special assessment for which the land has not been sold at the date of the certificate of title. (Sec. 24.)

3. Any lease for a period not exceeding three years, where is actual occupation of the premises thereunder. (Sec. 24.)

4. All rights in public highways upon the land. (Sec. 24.)

5. Such right of appeal or right to appear and contest the application as is allowed by this chapter. (Sec. 24.)

6. The right of persons, not bound by the initial decree because of some irregularity, insufficiency or other cause, to open or set aside the decree of registration within six months after entry. (Sec. 27.)

7. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitation for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity.

8. The right to question the action, decision, or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction or other error on the part of registrars in making entries, but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle.

#### TENNESSEE.

(Public Acts, 1917, p. 139.)

1. Any subsisting lease or agreement for a lease for a period not exceeding five years, where there is actual occupation of the land under the lease. The term "lease" shall include a verbal letting. (Sec. 15.)

2. General taxes for the current or fiscal year in which certificate is issued and special taxes or assessments which have not been confirmed. (Sec. 15.)

3. Such right of appeal, writ of error, right to appear and contest the application, and action to make counterclaim as is allowed by the act. (Sec. 15.)

4. Liens, claims, or rights arising or existing under the laws or Constitution of the United States which the statutes of the Commonwealth can not require to appear of record in the registry. (Sec. 15.)

5. Any public highway if the certificate of title does not state that the boundary of such way has been determined. (Sec. 15.)

6. The right of persons, not bound by the initial decree because of some irregularity, insufficiency, or other cause, to open or set aside the decree of registration within one year after entry. (Sec. 12.)

7. The right of persons not appearing upon the certificate to set up claims to the land, since the statute does not make valid provision by a statute of limitations for barring claims which may arise in cases wherein the title passes through judicial proceedings subsequent to original registration, such claims surviving by reason of the statute in such proceedings (probate, foreclosure, etc.) not having been followed or other irregularity.

8. The right to question the action, decision, or entry of registrars, since the statute makes no provision by a statute of limitations for barring claims arising by reason of misconstruction or other error on the part of registrars in making entries, but accepts the same as conclusive in certificates in the hands of innocent purchasers and encumbrancers, contrary to the decisions and principle.

9. In any action or proceeding brought for ejectment, partition, or possession of land, the title to which has been registered, the general statutes of limitations of the State are to control. (Sec. 18.) The evident purpose of the one year statute of limitations provided for in section 12 of the act appears defeated by section 18, and the acceptance of original certificates of registration after one year from date of entry is thereby rendered inadvisable.



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